

1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x

2  
3 DAVID FLOYD, et al.,

4 Plaintiffs,

5 v. 08 CV 1034 (SAS)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.  
10 March 14, 2013  
11 10:10 a.m.

12 Before:

13 HON. SHIRA A. SCHEINDLIN,

14 District Judge

15 APPEARANCES

16 BELDOCK LEVINE & HOFFMAN, LLP

17 Attorneys for Plaintiffs

18 BY: JENN ROLNICK BORCHETTA

19 JONATHAN MOORE

20 COVINGTON & BURLING, LLP

21 Attorneys for Plaintiffs

22 BY: KASEY MARTINI

23 GRETCHEN HOFF VARNER

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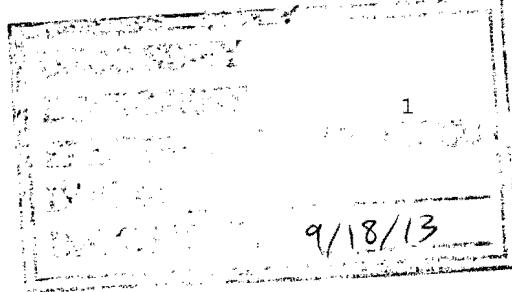
25 CENTER FOR CONSTITUTIONAL RIGHTS

26 Attorneys for Plaintiffs

27 BY: DARIUS CHARNEY

28 SUNITA PATEL

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The Clerk of the Court is directed  
to docket this transcript of the  
March 14, 2013 conference  
in Floyd v. City of New York, 08 Civ. 1034.

  
Shira A. Scheindlin, USDC  
9/18/13

1  
2 Appearances (Cont'd)  
3

4 MICHAEL A. CARDOZO, Corporation Counsel  
4 for the City of New York  
5 Attorneys for Defendants  
5 BY: HEIDI GROSSMAN  
6 BRENDA E. COOKE  
6 JOSEPH MARUTOLLO  
7 MORGAN D. KUNZ  
7 SUZANNA PUBLICKER  
8 LINDA DONAHUE  
8 LISA M. RICHARDSON  
9 JUDSON VICKERS

10  
11 Also present: Christopher Dunn, Esq., for Ligon plaintiffs  
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1 D3E6NYC1

Conference

2 (In open court; case called)

3 THE COURT: So this is our last conference before we  
4 start the trial on Monday. I want to make sure that everything  
5 is smooth for Monday. So anything we need to take up, this is  
6 the day to take up.

7 I do have letters regarding Professor Silverman and  
8 that is detailed and I will turn to it. But I had another  
9 letter -- it looks like I might have misplaced it -- about  
10 sequestration of witnesses and a couple other issues. I don't  
11 know where that letter is, but I read it. It wasn't too  
12 complicated. There were three issues raised and one of them  
13 was sequestration. So let's take up the three issues in that  
14 letter.

15 There was no written response to the March 12th  
16 letter, right, from the City?

17 MS. GROSSMAN: That's correct, your Honor.

18 THE COURT: So we can just do it. On the witness  
19 sequestration issue, have the parties agreed?

20 MS. GROSSMAN: I think we have no objection, your  
21 Honor. We have no objection.

22 THE COURT: So that is agreed, that is, plaintiffs'  
23 limited sequestration? It seems like there is a stop story,  
24 the witnesses to that story, whether they are the witnesses of  
25 the person stopped, they will not be in the courtroom until

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1       they testify, is that correct?

2            MS. VARMER: Yes, your Honor.

3            THE COURT: That is your understanding, too, Ms.  
4        Grossman?

5            MS. GROSSMAN: Yes, your Honor. Other testimony  
6        witnesses can sit in, but not in the particular incident in  
7        question. That is fine.

8            THE COURT: Then was the topic of the sequencing of  
9        liability and remedy by the police and I suspect there is a  
10       dispute, but again not having heard from the City yet, I don't  
11       want to rule until I have.

12           MS. GROSSMAN: Well, your Honor, we may not have a  
13       dispute.

14           THE COURT: That would be good.

15           MS. GROSSMAN: Given the request of the plaintiffs, it  
16        is tied into the issue that our expert on remedy is going to be  
17        out -- is not available for at least a week. He is on vacation  
18        and given the short notice we were not able to work around  
19        that. So we would like an extra week to put in our report.  
20        That would mean that -- it is currently due on April 5th. We  
21        would ask until April -- not even a week -- April 11th.

22           Then we would ask since we're basing our brief in  
23        response based on the expert report that we just have another  
24        week to put in our remedy brief, which would mean that we would  
25        extend it from April 4th to April 19th. We would just ask if

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1 we could do that then there would be no prejudice to the  
2 plaintiffs because the remedy witnesses would go after and we  
3 would just ask for that accommodation from the Court.

4 THE COURT: Let's separate the two issues first.  
5 Despite what I may have said at any prior hearing, it  
6 absolutely does make sense to have sort of the liability trial  
7 so to speak followed by the remedy trial. I still am not  
8 bifurcating. I don't intend to rule in the middle. We're  
9 going straight from one phase to another. It makes since to  
10 have all the proof on the liability on the record before the  
11 person testifies with respect to remedy. That is first.

12 Second, I think at the last conference, I reiterated  
13 that I would not be in Court on the 25th and 26th and then I  
14 said that I had something mid-April. I made a little joke  
15 about how they didn't deserve me to speak. They now remedied  
16 that. I will not be here April 11th or 12th. So that is two  
17 days down in that week.

18 MR. MOORE: Judge --

19 THE COURT: So we have five trial days the first week.  
20 We have three trial days the next week -- 27, 28, 29. We  
21 talked about Good Friday. When is that again?

22 MS. COOKE: March 29th, your Honor.

23 THE COURT: We were having the debate about a half  
24 day. I didn't want to do anything that was wrong so I wondered  
25 if that morning -- given who the witnesses are, maybe you don't

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1 need to be here.

2 MS. COOKE: It is not myself, your Honor. It is other  
3 members of the team as well who are observant of that holiday.

4 THE COURT: You have eight or nine lawyers. I wonder  
5 if we could know who the witnesses would be for that morning.  
6 We can stop at 1:00.

7 MS. COOKE: I think based on the list that the  
8 plaintiffs have provided of their witness order at this point,  
9 they have identified who they expect to go for the first two  
10 weeks and that would effect witnesses that Mr. Marutollo was  
11 responsible for and several witnesses that day. So it does  
12 still present a conflict for the City.

13 THE COURT: For that morning. In other years I know I  
14 have used half the day.

15 MS. COOKE: The difficulty, your Honor, if you would  
16 like me to explain, the observant of the holiday service occurs  
17 at a time period, which the events occurred and it is an  
18 observation of series of events for the Christian holiday.  
19 There is not a lot of option. It is not like the church has  
20 multiple services on that day. So we're not really attempting  
21 to be difficult.

22 THE COURT: I know you are not attempting to be  
23 difficult. I know in other years we worked out morning and  
24 afternoon.

25 MS. COOKE: It doesn't appear that I will have a  
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1 witness necessarily.

2 THE COURT: It might depend on the witnesses. Let's  
3 keep playing that by ear. If we don't do any witnesses that  
4 day, we don't. That's that.

5 Then I do intend to work the April 1st week. Who does  
6 that present a problem for? 1st and 2nd are holidays. Nobody  
7 is taking those. I know I should be, but I am not. Then the  
8 next week is half again, 8th, 9th and 10th. Every week is  
9 full.

10 So now let's turn to Ms. Grossman's request on those  
11 extension. Is there a problem with the expert report is  
12 delivered on April 11th, one week extension?

13 MR. CHARNEY: Yes, it is. Your Honor has already  
14 given the defendants a three-week extention on their brief. I  
15 think the brief is.

16 THE COURT: That is why I started with the expert  
17 report. Would it present a problem for you if you received the  
18 expert report on April 11th when there is no trial that day or  
19 Friday or Saturday or Sunday?

20 MS. PATEL: I think the concern is that we would need  
21 time to work with our expert on the response on the testimony  
22 and not having -- this is a long trial. We're going to be on  
23 trial every day.

24 THE COURT: Actually not. That is why we went through  
25 the calendar.

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1 MS. PATEL: You are right. The Court and plaintiffs  
2 didn't object at all to the defendants' having a month to work  
3 with their expert on the report. It seems that another week  
4 would actually prejudice us. We would be right up against the  
5 same problem of potentially the witness -- our expert witness  
6 being put on very soon thereafter.

7 THE COURT: Soon thereafter, but as the good news has  
8 it you have a four-day recess right there where you and the  
9 expert could work together without you being in trial.

10 Do you think you could have it the morning of the  
11 11th, not the close of business, but 10:00 a. m., so they would  
12 have all of the 11th, 12th 13th, 14th?

13 MS. GROSSMAN: If we can have it by noon, 11:59.

14 THE COURT: You would have three and a half days of no  
15 trial. That is a lot to work with the expert. He is  
16 apparently out of the country.

17 MS. GROSSMAN: He is out of the state on vacation.

18 MS. PATEL: Your Honor, I think if it is okay I would  
19 like to check with our expert. We had discussed with him the  
20 deadline of the 5th. He has other things of course that he is  
21 also working on if we can just get back to you.

22 THE COURT: Like I said, though, you are trial on the  
23 8th, 9th and 10th. So you are not available to work with him.  
24 He would be reading it. Then the 11th, 12th, 13th, 14th you  
25 would have a good chunk of time. I don't know that we'll be

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1 done with the liability case by that time given the on and off.  
2 We have 16 trial days before the 11th.

3 Do you think that is going to finish the liability  
4 phase?

5 MS. GROSSMAN: I don't think the plaintiffs will be  
6 finished by then and the City then has to put on their  
7 witnesses.

8 THE COURT: Some of them. Some of them will be called  
9 in the plaintiffs' case.

10 MS. GROSSMAN: A fair amount won't.

11 THE COURT: They will not be recalled except with  
12 exceptional circumstances.

13 MS. GROSSMAN: You are right. Even the new witnesses  
14 who have not been called, we have a fair amount --

15 THE COURT: How long do you think the plaintiffs'  
16 liability case is? Have you tried to block it out in days?

17 MR. CHARNEY: 20 to 30 days.

18 THE COURT: I don't see how you are prejudiced. We  
19 only have 16 trial days before the 11th.

20 Did you want to be heard, Mr. Dunn?

21 MR. DUNN: Yes. I am sorry to be talking from the  
22 cheap seats.

23 THE COURT: But you are speaking loudly so that is  
24 good.

25 MR. DUNN: You made it quite clear you expect when a  
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1 witness appears that is the only time he or she will appear.  
2

3 THE COURT: Hopefully.

4 MR. DUNN: The plaintiffs have indicated they will  
5 call a number of department officials as part of their case.  
6 They may well have testimony that relates to remedy,  
7 particularly the higher level officials. So just as the chief  
8 of the department on the stand, he likely will have something  
9 to say about remedy. If we have not seen the City's report  
10 about remedy or relief about remedy, it will make it difficult  
11 for us to think about what questions to be asking him while he  
12 is there on the stand that might bear on remedy.

13 THE COURT: That seems strange to me, Mr. Dunn. The  
14 lawyers at the front table have been living with this case five  
15 years. If they don't know what to ask Chief Esposito, that  
16 will be surprising me. You haven't been living it as long, so  
17 you haven't figured out what to ask Chief Esposito but I think  
18 you cross-examined him already. So all of you are well  
19 prepared to cross-examine Chief Esposito. I don't think these  
20 expert opinions will affect cross-examination.

21 MR. DUNN: Only in the following sense: The expert  
22 says, Here are the things that do or don't need to happen for  
23 purposes of remedy.

24 THE COURT: The expert says that.

25 MR. DUNN: It is a remedy expert. We have never even  
seen that report and Chief Esposito or some other high-level

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1 official on the stand. We don't have anyway to think about  
2 cross-examining him vis-a-vis the remedial position taken by  
3 the City. So all I am saying is that the longer we, the  
4 plaintiffs, in both cases learn what the City's actual position  
5 is about remedy, we cannot factor in their position when we  
6 have our one opportunity to cross-examine a City official who  
7 might be on the stand during the plaintiffs' case.

8 MS. GROSSMAN: Your Honor, Chief Esposito is actually  
9 not on the Ligon plaintiffs remedy witness list.

10 THE COURT: That is not his point. He didn't say he  
11 was calling him affirmatively. He said when he is called in  
12 the plaintiffs' case, people cross-examine witnesses, and he is  
13 concerned that there are questions that one might pose to Chief  
14 Esposito if they knew what your remedy expert was saying were  
15 bad ideas. He is not going to propose remedies. He is going  
16 to say why remedies are not necessary. He is saying that might  
17 affect the strategy in cross-examining Chief Esposito.

18 The report wasn't due until the 4th, is that what you  
19 said?

20 MS. GROSSMAN: Right.

21 THE COURT: I don't think it was planned that you  
22 would have had that particular example. I know it was an  
23 example, but you probably would not have had the time for  
24 Esposito anyway.

25 MR. DUNN: That's true. I am focusing on the brief.

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1 You may recall the brief was originally due February 22nd.  
2 Then it was due March 11. Now we're talking April 9th.  
3 THE COURT: Are you asking for a month today on the  
4 brief? I understand the week for the man who is on vacation.  
5 I wasn't happy about, but I understand it. When is it? Is it  
6 it due the 4th and you are asking for the 11th?

7 MS. GROSSMAN: Yes, for the report.

8 MR. CHARNEY: The brief.

9 THE COURT: No. No. I know. I am getting to the  
10 brief. The report I think we're done with it. I think I am  
11 going to say 11:59 or earlier on the 11th.

12 MR. MOORE: Judge, with respect to that would you  
13 agree that if there are issues that do arise and the person has  
14 already testified before there was time to analyze the report  
15 that you would be open to recalling --

16 THE COURT: I am always open for an application for  
17 good cause. I told the City that the last time.

18 Remember that, Ms. Grossman, we discussed that with  
19 high-level officials, if you need to recall, show me good  
20 cause? If something comes up in this remedy or expert report  
21 and it really necessitates recalling Chief X, I will listen to  
22 your argument.

23 When is the brief due now? Not the report. We took  
24 care of the report.

25 MS. GROSSMAN: April 5th. I have of a proposal. To  
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1 accommodate Ligon plaintiff concern because there are two  
2 different remedy proposals --

3 THE COURT: What is two different?

4 MS. GROSSMAN: Well, the Ligon plaintiffs put in their  
5 own remedy brief and the Floyd plaintiffs puts in their own  
6 remedy brief.

7 THE COURT: There must be overlap, is there not?

8 MS. GROSSMAN: There is some overlap. But to the  
9 extent there is not, what we can do is respond on the date that  
10 we already have to the Ligon plaintiffs. But my concern is  
11 with our expert, we need then to incorporate with the expert is  
12 going to say into the brief. It doesn't make sense to stagger  
13 it. We need that extra time and we hope the Court will indulge  
14 us given the truncated schedule that we have to respond to  
15 this. We just would appreciate that that accommodation.

16 MR. MOORE: Can we respond that?

17 THE COURT: Ms. Patel is standing.

18 MR. MOORE: I want to make sure --

19 MS. PUBLICKER: I see her. She is not as tall as you,  
20 but she is just as visible. I see her standing, Mr. Charney.

21 MS. PATEL: I will reiterate what Mr. Dunn said. This  
22 is now the third or fourth continuance sought on this brief.  
23 They have had our brief for --

24 THE COURT: When was your brief filed?

25 MS. PATEL: We filed February 4th.

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1                   MR. CHARNEY: No. March 4th.  
2                   MS. PATEL: March 4th. Simultaneously we provided the  
3 expert report.

4                   THE COURT: You did both on March 4th?

5                   MS. PATEL: Yes, your Honor.

6                   THE COURT: Ms. Grossman, why does the brief have to  
7 come even later than the expert report? The plaintiffs were  
8 able to do it simultaneously, the brief and the report, why  
9 cannot that brief be in the 11th, which is again an extension  
10 of its due date? What is the current due date?

11                  MS. PATEL: April 5th, which is an extension.

12                  THE COURT: I understand. There has been a fair  
13 amount of extensions. It is correct you will have the  
14 plaintiffs' brief since March 4th. It does seem wrong to keep  
15 extending the brief day. Can you not do them both on the 11th?

16                  MS. GROSSMAN: The brief is going to be based on the  
17 report.

18                  THE COURT: I know and you will have the report. It  
19 is one thing to turn it over to adversary, but lawyers see it  
20 days and days if not weeks and weeks before that. It is no  
21 secret to me that also lawyers talk to the expert, work with  
22 the expert. It is joint effort in every case. I understand  
23 that. You are not seeing it for the first time that morning  
24 that's for sure. You are working with it and with the expert.  
25 It seems to me you can do them simultaneously and that is an

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1 extension and it really is prejudicial to go further. So I  
2 would say both of them on the 11th at 11:59. That's enough.  
3 The brief is due at the same time.

4 MS. GROSSMAN: Perhaps we can have until the end of  
5 the day on the brief just so we can incorporate. What it is is  
6 the logistics of when you finalize a report, then you have to  
7 incorporate the final report into the brief.

8 THE COURT: Right. I still say to you are working on  
9 both simultaneously. You are meshing the two documents. Both  
10 briefs should be in at the same time on the same day.

11 Did we take care of topic two?

12 MS. GROSSMAN: Yes, your Honor.

13 THE COURT: That leaves with us with the  
14 November 15th, 2010 letter Police Commissioner Kelly. I  
15 understand the City is putting this again on its docket. I  
16 ruled on this. I really have.

17 MS. GROSSMAN: Your Honor, the reason why the  
18 plaintiffs object to that letter -- it is a very short letter.  
19 It is to the Christine Quinn, City Council. The reason why the  
20 plaintiffs objected is because they felt this was an end run  
21 around Police Commissioner Kelly coming in to testify. That is  
22 not what our purpose is. Our purpose is to show notice. The  
23 plaintiffs have put in collaborative process as a piece of this  
24 case that community input is required.

25 THE COURT: That is one of their suggestions?

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1 MS. GROSSMAN: Yes. To the extent the City can  
2 demonstrate that there is a communication and a work with the  
3 City Council and notifying the City Council of what it is that  
4 the police department is doing, that part of the democratic  
5 process is something we can redact the Police Commissioner's  
6 name. This is a letter coming from the City, the Police  
7 Department, saying this is what the Police Department is doing.  
8 I would assure the Court that the City is not relying on one  
9 letter to say this is proof that the City is doing everything  
10 that is has itemized in its letter. We're going to supplement  
11 that with proof from other witnesses. The purpose of the  
12 letter is to show the communication between City Council and  
13 Police Department that at a certain point in time this is  
14 what --

15 THE COURT: What is the date of the letter?

16 MS. GROSSMAN: It is November --

17 MR. MOORE: 15th.

18 MS. GROSSMAN: -- 15, 2010. So this is a bench trial.  
19 I think the Court can take it and use it for its appropriate  
20 purpose.

21 THE COURT: Which is limited to your saying just to  
22 show that the --

23 MS. GROSSMAN: Sure.

24 THE COURT: -- to show that the Police Department is  
25 in communication with the City Counsil on this issue.

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1 MS. GROSSMAN: Right.

2 THE COURT: That's the whole point?

3 MS. GROSSMAN: Right. And notifying this is the plan  
4 or the itemized plans of what it says it has communicated to  
5 the City Council what is being done. Of course we have to  
6 prove up what we have done if the letter itself doesn't prove  
7 that it was done. We wanted it for that purpose.

8 THE COURT: She is saying it is not offered for the  
9 truth of this. It is being offered to show those things are  
10 being accomplished but merely to show that notice between one  
11 city agency essentially another by the government. I guess you  
12 call it the executive branch or legislative branch trying to  
13 notify that branch that we are doing these things and not in  
14 the context of what we're doing. Ms. Grossman admits the  
15 letter is just to show that they are in communication, that  
16 they are keeping those lines of communication open. That is  
17 the sole purpose. The City would have to prove that the steps  
18 allegedly taken are in fact taken. It cannot be offered for  
19 the truth merely to show that the contact is being made between  
20 the Police Department and City Council. I don't have a problem  
21 with that.

22 MR. CHARNEY: The part that we're concerned about --  
23 well, first, we'll just say we don't understand why that is  
24 relevant.

25 THE COURT: Well, she just told you why it is  
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1 relevant. You are advocating community involvement and all she  
2 is saying is one of our arguments is that we're keeping the  
3 legislative branch of the City notified. We notified the City  
4 Council. I hope that is the right title.

5 MR. CHARNEY: Speaker.

6 THE COURT: What is your title?

7 MR. CHARNEY: I don't see how that is community  
8 involvement.

9 THE COURT: You don't have to. That is a merits  
10 argument you are welcome to make some other time. They are  
11 saying they are keeping this person -- what is her title?

12 MS. GROSSMAN: Speaker.

13 THE COURT: Speaker of?

14 MS. GROSSMAN: The City Council.

15 THE COURT: All they want it for is to show that they  
16 have kept in touch with the Speaker of the City Council,  
17 period. You can then argue that is not community involvement.  
18 You can argue anything you want.

19 MR. MOORE: Advocated the collaborative process, which  
20 the City rejected out of hand as part of the remedy phase.

21 THE COURT: Yes, I know.

22 MR. MOORE: Saying that they are advising the City  
23 Council of how they have done something with regard to the RAND  
24 report, which is contained letter, doesn't go to --

25 THE COURT: That is arguing to me about the merits of  
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1 it, not the procedural niceties. All she is saying you should  
2 let the letter in for our desire to prove that we stayed in  
3 touch with the City Council. Then you can make any argument  
4 that it doesn't show anything, they haven't proved up the  
5 things they said anything way. But if they want to show they  
6 wrote a letter, so what?

7 MR. CHARNEY: This is remedy evidence. This is not  
8 liability evidence. That is what Ms. Grossman said, we are  
9 using it so show the community involvement issue that we  
10 raised.

11 THE COURT: That is what she said.

12 MR. CHARNEY: That is the first thing. To be clear,  
13 it does not go to liability.

14 THE COURT: I don't know.

15 MR. CHARNEY: When I say "I don't know," I don't know  
16 what Ms. Grossman's position is.

17 Ms. Grossman.

18 MS. GROSSMAN: Well, I believe that there is a lot of  
19 overlap between remedy and liability. I think that is one of  
20 the challenges. So I do believe that could be used on  
21 liability as well.

22 THE COURT: How would you argue that? How does it  
23 affect liability? Just the sentence. The only thing you are  
24 using it for is just to show that the Police Department kept  
25 the City Council apprised.

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1 MS. GROSSMAN: There is also a claim of deliberate  
2 indifference and so we believe this goes to that.

3 THE COURT: You believe that the City staying in touch  
4 with City Council proofs that they didn't act with deliberate  
5 indifference?

6 MS. GROSSMAN: That's true. From a mechanics  
7 standpoint, you want us to be efficient in terms of polling  
8 witnesses. Does it make sense for one letter to have someone  
9 come back and say on remedy let's call this person and say this  
10 letter was sent.

11 THE COURT: No. But are we still arguing about the  
12 NYCLU report that the City says it never received? That sounds  
13 fantastical to me. By the sake token, do they need to find the  
14 person that put it in the mail or walked it over? You don't  
15 want to concede this report was received when all the evidence  
16 seems to point to receipt? Do you want them to find that  
17 witness still? It seems like a goose and gander approach. I  
18 understand why you want this letter and it is fine with me.

19 MS. GROSSMAN: Thank you, your Honor.

20 THE COURT: What is your position on NYCLU report?

21 MS. GROSSMAN: I stand by the position I took at the  
22 last conference.

23 THE COURT: That the City is not conceding the Police  
24 Department ever received it?

25 MS. GROSSMAN: I have not received any confirmation  
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1 that anyone received it and so I reluctant as to lawyer to --

2 THE COURT: If your client denies receipt...

3 MS. GROSSMAN: So I take the position that -- that is  
4 why I wanted to have the plaintiffs verify.

5 THE COURT: No. I guess they will be able to call any  
6 City witness, hundreds if necessary, to ask about receipt of  
7 the report. It seems like if someone commented on it, they  
8 must have received it.

9 MS. BORCHETTA: Your Honor, if we can have one moment?  
10 (Pause)

11 MR. CHARNEY: Your Honor, on this Kelly letter just so  
12 we can --

13 THE COURT: It is a limited purpose and they are  
14 welcome to argue that. It goes to proving that they did not  
15 act with deliberate indifference. It is still being offered  
16 for one sentence, the one sentence is the City Police  
17 Department stayed in touch with the City Council at least as of  
18 November 2010.

19 MR. CHARNEY: Just to make sure the substance of  
20 letter, in other words, all of the RAND recommendations which  
21 the letter sets forth the City has made effort to implement,  
22 none of that comes in?

23 THE COURT: Not as proof. It comes in to show that  
24 the statement was made, but it doesn't prove that the City  
25 implemented anything.

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1 MR. CHARNEY: Okay.

2 THE COURT: It cannot be offered for the truth. The  
3 City would have to prove that it implemented it. I will not  
4 take it as truth that the City implemented anything. That the  
5 City told somebody they did, that is the point. That is not  
6 offered for the truth. It would could have been a lie, but the  
7 notice was given. They need to prove that they implemented  
8 something.

9 MR. MOORE: I apologize for stringing this out, but it  
10 could go to liability because it could show that they were not  
11 deliberately indifferent.

12 THE COURT: They are going to argue that.

13 MR. MOORE: So that in effect is the same thing they  
14 were they prevented from doing before, which is Kelly  
15 testifying.

16 THE COURT: No. It is not offered for its truth. I  
17 will not accept the letter proves they implemented anything.  
18 You have a sophisticated trier of fact. I get the point.

19 MR. MOORE: If it is not accepted for the truth, it  
20 can never go to the issue of deliberate indifference.

21 THE COURT: That is a good point. You can make that  
22 argument during summation. It is not hard for me to understand  
23 those legal thoughts. I do this every day all day for years,  
24 for decades.

25 MR. CHARNEY: Our concern is obviously the trial  
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1 record is important not only for you but if there is an appeal  
2 and our concern is if there a letter in the trial record --

3 THE COURT: I said three times. With all the lawyer  
4 power that you have here somebody should mark this point in the  
5 transcript so you can tell the appellate court it is not  
6 accepted for the truth of it. It does not prove that anything  
7 was implemented. I will not accept it for proof that something  
8 was implemented. So when the City makes a deliberate  
9 indifference argument, you will say, Your Honor, it cannot  
10 prove that. All it can proof is what it purports to prove that  
11 the Police Department said something to the Speaker of the City  
12 Counsil. We don't know what they said was true or not. Put a  
13 little mark on the transcript somebody. So we took care of  
14 that. You can have your letter back.

15 Before we turn to the Silverman Eterno issue are there  
16 any other details for Monday's trial that we need to talk  
17 about? By the way, just in case you know my clerk was in touch  
18 with you on an overflow room. Was anybody in touch with you?

19 MS. COOKE: We received an e-mail from Mr. Brazil that  
20 said it was the 26th floor courtroom.

21 THE COURT: Then the plaintiffs did also?

22 MR. CHARNEY: Yes. Thank you.

23 THE COURT: I think we did that for the first day.  
24 Did you need it for more than that?

25 MR. CHARNEY: Is it possible to have it for the first  
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1 week?

2 THE COURT: I don't know the resources of the  
3 building. We have to ask. We can play it day by day. If they  
4 can give it to us for the second day and nobody is there.  
5 There are only some courtrooms.

6 MR. MOORE: It is like a Broadway show. If nobody  
7 shows up, it is canceled.

8 MS. GROSSMAN: One housekeeping matter. The City asks  
9 permission to have two attorneys deliver the opening?

10 THE COURT: Sure.

11 Anything else? Any small point?

12 MS. GROSSMAN: Your Honor, we have one small point  
13 regarding the exhibits to be used for plaintiffs' opening. We  
14 received it today.

15 THE COURT: Good.

16 MS. GROSSMAN: We have one issue with one of the  
17 documents, one of the pieces of evidence that we have a problem  
18 with and we object to and it is listed on a pretrial order. So  
19 it may be that we wait until we get to that on the list of  
20 exhibits that we're talking about rulings.

21 THE COURT: No. Today, you mean?

22 MR. CHARNEY: Yes.

23 MS. GROSSMAN: I thought at today's conference we were  
24 going through some of the issues on the joint pretrial order.

25 THE COURT: Why don't we take it out of turn and do

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1 it.

2 MS. GROSSMAN: Ms. Publicker will address you.

3 THE COURT: Do I need the exhibit?

4 MR. CHARNEY: I assume you are talking about this one?

5 MS. PUBLICKER: Plaintiffs' Exhibit --

6 MS. BORCHETTA: 16.

7 THE COURT: I was handed two different things.

8 MS. PUBLICKER: I believe, your Honor, the black and  
9 white copy is what we provided in course of discovery and Ms.  
10 Borchetta questioned Lieutenant Korabel about at his  
11 deposition. The color copy we received earlier this week. The  
12 color copy is what they would like to use in their opening  
13 statement on Monday.

14 MS. BORCHETTA: Also to further clarify, this entire  
15 document that you have been handed is four pages.

16 THE COURT: Four pages. I will state for the record  
17 it is PL001003 through 1006 -- no, 1005-A.

18 MS. BORCHETTA: Yes. That is the entirety of what is  
19 on Plaintiffs' exhibit list as part the JPTO as Exhibit 16.

20 THE COURT: What is it?

21 MS. PUBLICKER: So, your Honor, what this is is it  
22 appears to be a Facebook posting of alleged T-shirts from the  
23 30th precinct. According to this these pictures were posted  
24 between one and six months after the stop of Devin Almonor.

25 THE COURT: Who.

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1 MS. PUBLICKER: Devin Almonor, the first witness on  
2 plaintiffs' witness list. He was stopped in the 30th precinct.  
3 These photos were not uploaded to Facebook until one month and  
4 six months.

5 THE COURT: I am sorry. Whose Facebook page?  
6 MS. BORCHETTA: Your Honor, if I may provide some  
7 background on what these documents represent. These represent  
8 T-shirts that were sold by -- T-shirts sold with the 30th  
9 Precinct Club. One of our witnesses that we're calling is  
10 Lieutenant Korabel. He is one of the police officers who  
11 stopped Devin Almonor, who is a class member witness.  
12 Lieutenant Korabel, who is the supervisor in the 30th  
13 precinct --

14 THE COURT: Still?

15 MS. BORCHETTA: Now he is a lieutenant elsewhere. At  
16 the time of the stop of Almonor he was a supervisor in the 30th  
17 precinct and he testified that he saw the pages that are  
18 stamped PL001004 and 5, the second and third pages. He saw  
19 pictures that looked like this on the back and front of a  
20 T-shirt that was sold by 30th Precinct Club.

21 THE COURT: What is the 30th Precinct Club?

22 MS. PUBLICKER: It is not affiliated with the police  
23 itself. It an organization that the police officers form on  
24 their own to collect money for when police officers, family  
25 members dies or become ill and they distribute the funds for

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1 those officers. Ms. Borchetta questioned Lieutenant Korabel  
2 about this. He was not a member of the 30th Precinct Club. He  
3 did not have any of these T-shirts. He has never bought one.  
4 So to the extent that plaintiffs are using this to try and show  
5 poor character on the part of Lieutenant Korabel when he has  
6 never admitted to own one or they are using the 30th precinct  
7 to impugn the character of Lieutenant Korabel, it is  
8 irrelevant.

9 MS. BORCHETTA: Your Honor, that is not the basis on  
10 which we're submitting this document.

11 THE COURT: I am having trouble understanding still  
12 what this document --

13 MS. BORCHETTA: The page that is stamped PL1005 is an  
14 you unclear copy of the top 10 statements made by perps.

15 THE COURT: The top 10 statements made by?

16 MS. BORCHETTA: Perps, p-e-r-p-s. The last page of  
17 the exhibit, which is 1005-A is a better copy of that.

18 THE COURT: Right. I don't what this document is.

19 MS. BORCHETTA: These are pictures of a T-shirt that  
20 Lieutenant Korabel saw and he testified that he saw it while he  
21 was working at 30th precinct, sold by 30th precinct officers.  
22 The purpose of this document is not at all to impugn Korabel's  
23 character, but it is to show that we believe these statements  
24 on this T-shirt both make fun of stop victims and also  
25 perpetuate stereotypes about the communities we allege are

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1 being targeted for this stop and frisk tactic. We believe that  
2 that shows two things: Both bias by some police officers and  
3 also notice to the City that they are needed to be action to  
4 address potential bias by police officers in conducting stops  
5 and frisks. That is the purpose.

6 THE COURT: Does Lieutenant Korabel say when these  
7 words, the top 10?

8 MS. BORCHETTA: He said that while he could not recall  
9 the exact date, it was prior to 2012.

10 MS. PUBLICKER: However Devin Almonor was stopped in  
11 March 2010.

12 MS. BORCHETTA: It is separate and apart from the  
13 stop.

14 THE COURT: I realize that. He couldn't date it. He  
15 said he saw it sometime before 2012?

16 MS. BORCHETTA: Yes, your Honor.

17 THE COURT: We don't know when.

18 MS. PUBLICKER: He could not recall.

19 THE COURT: It could be December 2011.

20 MS. BORCHETTA: Right. He said it could have been  
21 before the stop.

22 THE COURT: It could have been as late of December of  
23 2011 because all he would say it was before 2012.

24 MS. BORCHETTA: Right.

25 THE COURT: Your strongest argument is that as of no  
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1 later than December 2011 at least some high-ranking officers in  
2 the 30th precinct saw this T-shirt message and therefore should  
3 have been aware that there may have been biases by some  
4 officers. That is the most general way you can put it.

5 MS. BORCHETTA: Also, your Honor, I asked him whether  
6 he as a supervisor in the 30th precinct upon seeing this  
7 T-shirt addressed it in any way with any of the officers under  
8 his supervision and he said no.

9 THE COURT: Did he say where?

10 MS. BORCHETTA: He said he did not remember where. He  
11 knew it was being sold by the 30th Precinct Club and he  
12 couldn't remember whether or not it was within the precinct  
13 property.

14 MS. PUBLICKER: He did testify that he did not believe  
15 it would be appropriate for officers to wear that T-shirt when  
16 they were on duty and in the 30th precinct.

17 MS. BORCHETTA: But --

18 THE COURT: You cannot interrupt. It is not going to  
19 work that way. She is speaking, you are not.

20 MS. PUBLICKER: However, he stated that -- he did  
21 state that if they were on their private time that they did  
22 have a constitutional right to express their free speech.

23 THE COURT: That is true. No one is quarreling with  
24 that. So I understand it the limited purpose of allowing this  
25 at all would be for argument that at some point in time no

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1 later than 2011 he saw this, not sure where or when, and didn't  
2 take any action or it didn't cause him to have any training  
3 session or meeting of the precinct and discussions about it.  
4 That is all they can prove, that he saw it and it didn't  
5 trigger any reaction, official reaction on his part to do  
6 anything having seen it. That is the only use, period.

7 Again it is not offered for the truth. It is not  
8 offered to show that some police officer wrote this. I don't  
9 know who wrote this. It could be someone in the community  
10 wrote in. He saw it. Your only point is he didn't do anything  
11 about it.

12 MS. PUBLICKER: Well, he testified, your Honor, that  
13 there was -- at some point after Lieutenant Korabel seen these  
14 T-shirts, there was a change in the Police Department policy  
15 disallowing the creation of these T--shirts.

16 THE COURT: That is fine. You can offer that. I am  
17 taking it solely for the limited purpose again not for the  
18 truth of the statement -- I haven't read it yet. It is not  
19 terribly important that I do -- but that he saw the words  
20 written on it and according to plaintiffs his testimony is he  
21 did nothing about it officially at or about the time he saw it.  
22 That's the only purpose which I take it.

23 MS. PUBLICKER: There is an issue, however, your  
24 Honor, because when plaintiffs showed the version to Lieutenant  
25 Korabel, he said that he could not read the back.

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1                   THE COURT: Could not?

2                   MS. PUBLICKER: Could not read the back. He didn't  
3 know what it said. He said that he saw something like this.

4                   MS. BORCHETTA: We would submit we put them together  
5 as exhibits because it is obviously the same document and we'll  
6 have to ask him about it.

7                   THE COURT: If he said he couldn't read the words that  
8 eliminates the notice point.

9                   MS. BORCHETTA: He said he saw a shirt that looks like  
10 this, the back of the shirt. And then if you look at the next  
11 page, if you overlay it, it is the same.

12                  THE COURT: I am missing your points.

13                  MS. BORCHETTA: When he saw on the T-shirt which would  
14 have been clear, our point is he identified. I showed him the  
15 two pictures and he said the one with the skull is the front  
16 and the one with the list was the back. I saw that.

17                  THE COURT: That's true. I past hundreds of T-shirts  
18 and I can't read most of the words. Sometimes I am curious,  
19 but I can't read the words because I pass them fast.

20                  MS. BORCHETTA: What I would submit, though, is that  
21 these -- we believe these are obviously the same documents.

22                  THE COURT: That is true. I am not sure if he saw the  
23 words. Let's say I am walking to work, right? I am going to  
24 give you an example. I am walking down the street and I see a  
25 T-shirt with words and I am actually interested. I try to read

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1 the words, but too late, the person is gone and I never figure  
2 out what it said. I saw the shirt, but I don't know what the  
3 message was.

4 MS. BORCHETTA: He didn't testify that he didn't see  
5 the shirts. He said he couldn't clearly read the copy.

6 THE COURT: I don't know that he saw these words. He  
7 recognizes the skull and the 30th precinct and he also saw  
8 there were words on the back. I don't know that he knows what  
9 those words were.

10 MS. BORCHETTA: Now that we have a better copy --

11 THE COURT: He saw it. Seeing it and reading the  
12 words are completely different. Usually a person is moving in  
13 a T-shirt. I don't know if the T-shirt is being worn. I don't  
14 know if the T-shirt was hanging. The long and short is I don't  
15 think this should be used on opening. If you want to use it  
16 for Korabel, I will listen to the testimony. It is giving a  
17 list of things as if the Police Department had notice of this  
18 list and I don't think there is any proof of that yet. I will  
19 not allow it for openings. Good luck with Korabel. That is my  
20 ruling. That is Exhibit 16.

21 Now, anymore smaller items before we turn to the  
22 Silverman situation?

23 MS. BORCHETTA: Can we clarify? I think we understood  
24 that we might be raising some of the issues around objections  
25 that are in the GPTO that we submitted on Monday. I think we

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1 just want clarification whether the Court wants us to raise  
2 certain things now or wait until --

3 THE COURT: I would try to do it now. Although, I  
4 don't have that material in front of me.

5 MS. BORCHETTA: So I suppose my question is whether  
6 you want us to do that before or after Silverman?

7 THE COURT: We'll do it after Silverman. We'll take a  
8 quick break so I can get the papers in front of me.

9 This Silverman situation is getting troubling. There  
10 are a lot of letters back and forth late in the day of this  
11 trial. I think in short that he should be deposed. I don't  
12 know why he has to be the fifth witness. There is nothing holy  
13 with the order. Why can't he be pushed back so there is  
14 time to do this deposition? Surely not everybody is taking off  
15 Monday and Tuesday. Some of us are and some of us are not.  
16 Ms. Cooke, for example, is taking Good Friday but not Passover.  
17 She is available to take Silverman -- Oh, he is probably not  
18 come to think about it. I don't know. Surely something can be  
19 worked out somewhere to get his deposition done. Why does he  
20 have to be the fifth witness as opposed to tenth or fifteenth  
21 witness. There is nothing holy about that. I think he should  
22 be deposed. I think that will stop a lot of the wrangling.

23 Unlike criminal litigation, nobody wants an undeposed  
24 witness. People get so nervous. They think the world will  
25 come to an end if they don't depose every single witness. I

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1 said long ago that if a witness is listed on the exhibit list,  
2 even if they weren't deposed in the discovery period, under the  
3 pilot project rules they would be deposed even if they are a  
4 late-named witness. I think he should be deposed. That will  
5 stop some of the wrangling.

6 MR. CHARNEY: A couple requests on that. Where your  
7 Honor was going on the dates, I think that that would work  
8 better for us. In other words, maybe do it on one of those  
9 trial days we're not on trial.

10 THE COURT: I don't know about Silverman.

13 THE COURT: That's an assumption.

14 MR. CHARNEY: I understand. We're going to talk to  
15 him. If he is available, we will ask the deposition be held  
16 then and not at some point during the trial.

17 THE COURT: I agree. He is more likely to be  
18 available Monday because Monday isn't the holiday, that is for  
19 the people who cook.

20 MR. CHARNEY: The second request, your Honor, is if we  
21 can limit the time. As we said over and over again in our  
22 letters, his testimony is going to be very limited. He did the  
23 surveys and he is only go to testify about very narrow portions  
24 of that.

25 THE COURT: That is the plaintiffs' position that they  
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1 don't seem to appreciate the defense position. Once you put  
2 the witness up, you cannot control in fairness the  
3 cross-examination. So while you want to offer him only for the  
4 three of the questions, if they want to talk about three other  
5 questions, I think they should be allowed to do it. What he is  
6 being really called for is his survey, the results. They can  
7 ask about different questions on the survey as long as it is  
8 relevant. As I said all along the efficacy of stops and frisks  
9 is not an issue for me or any court. The only issue for the  
10 Court is constitutionality, not efficacy. I am not a  
11 policymaker.

12 MR. CHARNEY: We agree with that.

13 THE COURT: Whether it is effective or not, I don't  
14 think that was the question. He asked the police officers to  
15 pressure to reduce crime, which is a little different than  
16 efficacy. I know you are only offering it for a limited  
17 purpose, but you are offering the survey.

18 MR. CHARNEY: I understand that. There are obviously  
19 free to ask questions about the results of the survey. I guess  
20 our concern is his methodology is set forth clearly in his  
21 articles.

22 THE COURT: I understand that.

23 MR. CHARNEY: And as far as I can tell, the deposition  
24 is to really get into that stuff to figure out what he did, how  
25 he did it, how he analyzed it, and to make him sit there for

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1       eight hours to talk about one very narrow methodology, and  
2       we're not talking about Jeff Fagan with 10 different --

3           THE COURT: I understand. The City doesn't have time  
4       to waste either. I am sure they will not take eight hours if  
5       they don't need eight hours. They are not going to do it to  
6       run the clock out. They are busy those days. Everybody is  
7       busy. They are in the middle of trial and holiday prep. They  
8       are not going to fool around. They are going to get what they  
9       need and go home. I don't know why it would take eight hours,  
10      but I am not going to limit it either. I am going to count on  
11      people's common sense and good faith to get it done.

12           MR. CHARNEY: Are there certain --

13           THE COURT: I suggest to you the best possible day is  
14      Monday.

15           MR. CHARNEY: I guess then on that same topic are  
16      there certain issues that they shouldn't be allowed to go into.  
17      This is a prolific writer. I don't know how many questions  
18      they are going to go into with him, none of which have to do  
19      with the survey keep in mind, but obviously have to do with the  
20      larger issues that are relevant in this case.

21           THE COURT: Well, since the efficacy of the stop and  
22      frisk program -- I don't think the City likes that phrase -- if  
23      there is such a program, the efficacy of it is not an issue at  
24      this trial. To ask him questions about that would be  
25      irrelevant. The relevance objection should be pressed.

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1                   MR. CHARNEY: What about issues he has written about  
2 in terms of how the com set is structured, the way they analyze  
3 crime data? Again, possibly relevant to this case, but not  
4 what he would testify about at all, not even a subject of the  
5 survey.

6                   THE COURT: Then I would say, no, the subject of his  
7 direct testimony is the survey, the results of the survey. If  
8 it is not part of the survey, then it is not appropriate.

9                   MR. CHARNEY: Okay.

10                  MR. KUNZ: I think there may be questions that can get  
11 towards Mr. Silverman's bias and how he constructed the survey.  
12 For example, the many articles he has written on his opinion on  
13 com stat, I may at his deposition may want to ask questions  
14 about those to flush out his opinion and to the extent that  
15 made its way into --

16                  THE COURT: He is not an expert. The letter the City  
17 wrote, The issue of this new expert witness -- and I circled  
18 that. He is not an expert witness. He is not a new expert  
19 witness. He is a fact witness because he did this survey and  
20 the survey results the plaintiffs think is relevant. He didn't  
21 prepare this survey at their requests. They didn't help design  
22 it. He is a researcher who was doing his own thing.

23                  MR. KUNZ: Your Honor, I do think there was some  
24 discussion about whether or not he was an expert in the survey  
25 construction and phrasing --

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1                   THE COURT: He is not being offered as one. He may be  
2 one in some other trial about, who knows what, copyright  
3 infringement and he can explain how to design surveys. He is  
4 not an expert in my opinion.

5                   MR. KUNZ: We may have questions about particular  
6 phrasing of questions.

7                   THE COURT: You probably do.

8                   MR. KUNZ: Indeed.

9                   THE COURT: He is not being called as an expert. He  
10 didn't have to produce an expert report. His report on survey  
11 is a report, but I am going to allow the deposition because  
12 civil litigation lawyers break out in hives if they don't get  
13 deposition before they testify. We tried criminal cases where  
14 freedom is at stake but not without depositions. You folks  
15 think you cannot have a witness on the stand who wasn't  
16 deposed. That is the way it is these days.

17                   MR. KUNZ: I appreciate that ruling, your honor. The  
18 other aspect of the defendants' motion here was data.

19                   THE COURT: I am not sympathetic to the data point. I  
20 will tell you why: You have the results. The results are in  
21 front of you. The only reason for the underlying data is to  
22 basically check the math or something to see if it is honest.

23                   MR. KUNZ: And to do different math, your Honor.

24                   THE COURT: Basically it is to do that. They gave you  
25 underlying data on three or four or five questions that is

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1 subject of his direct. If his math was inaccurate, you already  
2 can cross-examine and show that he jiggered the numbers or  
3 something.

4 MR. KUNZ: I will give you an example how we're  
5 limited. The 2012 survey broke down the respondents in three  
6 categories: Three com stat, ostensibly the Giuliani years and  
7 ostensibly Bloomberg years. We only have for the 2012 survey  
8 the earlier dividing line, pre1995, post1995. We don't have  
9 the dividing line later on.

10 THE COURT: I don't understand. Can you help me? I  
11 have the survey in front of me. Show me what you are talking  
12 about.

13 MR. KUNZ: Well, on the 2012 survey Questions 15, I  
14 lay out the specific numbers in the letter.

15 THE COURT: Question 15: What year did you retire?  
16 You you don't have --

17 MR. KUNZ: No, we don't have that.

18 THE COURT: What do you have?

19 MR. KUNZ: The professor has created a field that says  
20 did the person retire before 1995 or after 1995. We don't have  
21 the specific year that the people retired.

22 MR. CHARNEY: Can I respond?

23 THE COURT: No. No. Because I would like to follow  
24 what is on the survey and understand what the defendants have  
25 already. That is what I would like to know.

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1                   So when it says what year did you retire, the person  
2 writes a year in?

3                   MR. KUNZ: Yes. I believe so. This is a web survey.  
4 There is a drop-down menu.

5                   THE COURT: So the person puts the year in. What do  
6 you have?

7                   MR. KUNZ: I have a yes or no did the person retire  
8 before --

9                   THE COURT: How can you have a yes or no?

10                  MR. CHARNEY: Your Honor, can I respond?

11                  THE COURT: Yes.

12                  MR. CHARNEY: Just to clarify, the way the results  
13 were analyzed is they didn't actually -- Silverman and Eterno  
14 did not take the retirement year and factor it into their  
15 analysis. What they did is based on the retirement year, they  
16 divided the respondents into three groups -- pre-'95, '95 to  
17 '01, and '02 to the present. So for each person once they gave  
18 the year, they were put into that group and they created a data  
19 set in which every single response was put into either pre-'95  
20 and that dataset we gave to the defendants because with that  
21 dataset they can then run the numbers that Silverman and Eterno  
22 ran to see if they get the same results. So Silverman and  
23 Eterno never used the year in any way to analyze the data.  
24 That was not part of their analysis. So it is not correct to  
25 say we need the year they retire to be able to replicate the

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1 analysis.

2 THE COURT: Because they know which of the three  
3 buckets?

4 MR. CHARNEY: Right. They put everyone into a bucket  
5 and assigned them pre'95, '95 to '01, '02 to the present.

6 THE COURT: How many respondents were there in 2012?

7 MR. CHARNEY: 1900. They have every single response.

8 THE COURT: What do you mean every single response?

9 MR. CHARNEY: Sorry. They have data on every single  
10 respondent. For every respondent, whether they are pre'95--

11 THE COURT: Right. So they know the breakdown. They  
12 know there are 500 in one bucket, 200 in another bucket.

13 MR. KUNZ: That is not correct, your Honor. If  
14 Mr. Charney is representing that the plaintiffs are willing to  
15 give us each of those three buckets that helps all the dispute.

16 THE COURT: You don't know how many are in each of the  
17 three buckets?

18 MR. KUNZ: I know pre-1995 bucket and post-1995  
19 bucket.

20 THE COURT: You don't know how many are in the three  
21 buckets?

22 MR. KUNZ: Yes.

23 MR. CHARNEY: That was not my understanding.

24 MR. KUNZ: If they are willing to give that to us,  
25 great. We need that. I would posit that just because these

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1 professors did not look at the dates of retirement doesn't mean  
2 that we can't cross-examine them.

3 MR. CHARNEY: Of course.

4 THE COURT: It does. He is presenting the results of  
5 the survey. This is not a retained expert. Would you please  
6 get the numbers, raw numbers. 500 or 600 or 1200, whatever  
7 equals 19.

8 MR. CHARNEY: Yes.

9 MR. KUNZ: The only other issue here, your Honor, was  
10 the additional questions having to do with pressure.

11 THE COURT: I am in the survey.

12 MR. KUNZ: Question 2. So we have A, B and C. I  
13 believe I want -- and H. And I believe we want D and E, which  
14 has to do with pressure to decrease crime.

15 MR. CHARNEY: This goes back to the point you made,  
16 your Honor, which was the only reason they need the raw data is  
17 to replicate the analysis.

18 THE COURT: Yes. That is what I think, too. You have  
19 the results. You know how many checked box one through nine or  
20 ten, right?

21 MR. CHARNEY: They have that percent of the  
22 respondents.

23 THE COURT: It goes to one, the least pressure, and 10  
24 is the most pressure. So the 1900 you know basically is the  
25 breakdown.

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1                   MR. KUNZ: Well, we do know the professors' analysis,  
2 the progression analysis, on the raw numbers. But, no, we  
3 don't note raw numbers for those particular values.

4                   MR. CHARNEY: That is not true. They actually put the  
5 percent. In other words, this percent of respondents said it  
6 was high pressure. They have more than just the regression  
7 analysis.

8                   THE COURT: Of course.

9                   MR. KUNZ: The problem here too is that the two  
10 surveys changed. The professors changed their methodology  
11 between the 2010 article and 2012 article. For 2010 article we  
12 don't have three buckets. The professors didn't look at the  
13 three buckets; they only looked at two. So I think it is fair  
14 for us to go into the data, create the three buckets and see if  
15 it changes.

16                   THE COURT: Actually, it is not. If this person was a  
17 retained experts, I would understand turning over the data. I  
18 have big environmental cases and I have scientists and I do  
19 make them produce raw data and they are not happy about it.  
20 This is a totally different thing. These folks did what they  
21 did. It is a limited purpose. You do have the statistics. It  
22 says, 37 percent of 1900 checked great pressure. You can do  
23 the math yourself. What is 37 percent of 1900? Figure it out.

24                   MR. KUNZ: That is another issue, your Honor. The  
25 professors break it down. It is one to ten, one being low and

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1 10 being high. The professors break it down as eight, nine and  
2 10 being high pressure. If you move that down to seven, eight,  
3 nine and 10, it will change the results. Six seven, eight and  
4 nine will change the results. This goes into what weight your  
5 Honor should put into the survey. I cannot do that when they  
6 are withholding the data.

7 MR. CHARNEY: They can cross and point out what they  
8 call methodological flaws. They can say, Why didn't you use  
9 year as opposed to period of time? Why did you group the  
10 pressure answers?

11 THE COURT: That is the point. That is why I think  
12 you are entitled to a deposition. I am not going to have him  
13 produce all this data at this point. I did have a question  
14 before I make that final ruling. The City's letter says it is  
15 very easy and there is no burden at all. I have a marginal  
16 note saying, Is that true, somewhere in the City's letter.

17 MR. KUNZ: I believe that is the case, your Honor.

18 THE COURT: Hold on. Hold on a minute, please. There  
19 it is. There is a sentence that says, "Moreover since the data  
20 is kept electronically on SPSS software, which can easily be  
21 produced and which requires no redaction, there is no burden to  
22 plaintiffs or to the professors who conducted the survey for  
23 production of the data." Is that true? Is it that easy?

24 MR. CHARNEY: That I don't know because this isn't my  
25 retained expert.

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4 MR. CHARNEY: Pressure to decrease crime.

12 MR. CHARNEY: Eterno has the data.

16 MR. KUNZ: The corresponding ones from the 2008.

17 THE COURT: Yes. Just for that pressure question.

18 Fine.

19 Now I think we're ready for a very short break and I  
20 will see what we can do.

21 MR. KUNZ: I am available on March 26th that Monday to  
22 take his deposition. Do we have a date for the production of  
23 data.

24 THE COURT: He hasn't made the phone call yet. We can  
25 only go so far.

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1 MR. KUNZ: Thank you, your Honor.  
2 THE COURT: Today is the 14th. The phone call hasn't  
3 been made. I hope that will work out.  
4 We'll reconvene in three minutes.  
5 Did we get a hard copy of the joint pretrial order  
6 that was filed Monday? My clerk didn't think we got a hard  
7 copy.  
8 MR. MOORE: I have a hard copy.  
9 THE COURT: Was one delivered?  
10 MS. BORCHETTA: We did not know that was part of  
11 the --  
12 THE COURT: A hard copy would be good.  
13 MR. MOORE: Can I have a word with you?  
14 THE COURT: It's not related to this case?  
15 MR. MOORE: It is related to my availability.  
16 THE COURT: Personal matter, maybe a personal issue,  
17 health or something?  
18 MS. GROSSMAN: If that is what it is, that's fine.  
19 MR. MOORE: That's what it is.  
20 THE COURT: Fine.  
21 (Recess)  
22 THE COURT: Please be seated.  
23 Now, I have to say I thought we had worked on this  
24 problem, but we need to work on it more. In the first half of  
25 this morning's session many of you fell back on your older bad  
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1 habits of conferring while I am speaking and that makes it  
2 difficult for me and makes it difficult for the court reporter.  
3 I asked you and asked you and some of you got very good at it  
4 for a while and say, May we have a moment, and I say, Sure, and  
5 everyone confers. I think Mr. Charney you are singled out.

6 MR. CHARNEY: I am a bad offender.

7 THE COURT: You are a bad offender.

8 MR. MOORE: Repeat offender.

9 THE COURT: That too. When you do that it is  
10 disturbing for the record and for me. If he want to talk to  
11 your colleagues, all you have to do is say is, May I have a  
12 moment. I thought we got that all figured out.

13 The other thing is, Ms. Borchetta, you were the  
14 biggest offender on this one, you cannot interrupt each other.  
15 When one attorney is on her feet as much as you want to say,  
16 That is not true, you have to wait your turn.

17 MS. BORCHETTA: Yes, your Honor. Sorry.

18 THE COURT: I think both sides of course.

19 Now, on this joint pretrial order, I did say I would  
20 try to rule as much as possible to make the trial smoother but  
21 because a courtesy copy was not provided we missed a beat. I  
22 am not prepared, but I will do it on the spot.

23 Where should I start, or where can I start?

24 MR. CHARNEY: Your Honor, we thought a good way to  
25 start is to start with Plaintiffs' exhibits.

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1                   THE COURT: That's fine. You are first.  
2                   MR. CHARNEY: There are several kind of buckets, in  
3 other words, objections that come up.  
4                   THE COURT: Should I start with Exhibit A?  
5                   MS. BORCHETTA: Yes, your Honor.  
6                   MR. CHARNEY: Yes, your Honor.  
7                   MS. BORCHETTA: B.  
8                   MR. CHARNEY: Are you looking at Exhibit B? Ours are  
9 numbered, 1, 2, 3 and so forth.  
10                  THE COURT: I think so. Plaintiffs' witness list with  
11 defendants' objections.  
12                  MR. CHARNEY: We can start there.  
13                  THE COURT: Is that a good place?  
14                  MR. CHARNEY: That's fine. I thought we were going to  
15 do exhibits. Exhibit B is the witness list. Sorry, exhibit  
16 lists. Exhibit B is the exhibit list.  
17                  THE COURT: Let me try to find that. Okay, Exhibit B.  
18 You are trying to say groupings.  
19                  MR. CHARNEY: So one of the broad objections that  
20 comes up over and over again is defendants' objection to the  
21 admission of records relate to CCRB investigations and findings  
22 and we disagree with that objection and Ms. Borchetta can tell  
23 you why we disagree with that objection.  
24                  MS. BORCHETTA: We thought that would be a good place  
25 to start since it applies to a lot of the documents and defense

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1       objections. So the defendants are objecting to CCRB findings  
2       letters and I know the Court has seen a lot of CCRB documents,  
3       but these are letters froms CCRB saying to either an officer or  
4       to someone who has submitted a CCRB complaint, We have  
5       conducted an investigation and we have done a thorough  
6       investigation and we have come to the following findings. Then  
7       it lists out, for example, abuse of authority and then it says  
8       exonerated, unsubstantiated or substantiated as the finding.  
9       Those are what we are calling CCRB findings letters. I have an  
10      example if the Court would like to see it.

11           THE COURT: Yes. What is your theory?

12           MS. BORCHETTA: So our theory of admissibility is that  
13       this is an exception to hearsay as a public record because it  
14       states under 803(8)-- we believe they are public record  
15       exceptions because these are regularly created by the CCRB and  
16       sent out as a matter of course once the board of CCRB has voted  
17       after an investigation.

18           THE COURT: Let's start by reading the rule. 808(8):  
19       A record or statement of a public office if: A. It sets out  
20       the office's activities, a matter observed while under a legal  
21       matter to report but not a criminal case a matter observed by  
22       law enforcement personnel or in a civil case or against the  
23       government in the criminal case factual findings from a legally  
24       authorized investigation and neither the source of information  
25       nor other circumstances indicate a lack of trustworthiness.

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1                   So are you relying on (a)(3) in a civil case factual  
2 findings from a legally authorized investigation?

3                   MS. BORCHETTA: Your Honor, I think it could be either  
4 one or three to the extent --

5                   THE COURT: One is the office's activities.

6                   MS. BORCHETTA: To the extent that it's in setting out  
7 that this was a CCRB investigation and these are our  
8 conclusions in that way it is setting out the activity of the  
9 investigation and the results of it.

10                  THE COURT: Let me see one of those while we're  
11 talking.

12                  MS. BORCHETTA: Sure. In a previous case, your Honor,  
13 you have ruled that CCRB findings would come in under 808(8)  
14 exception and there is a witness on our list, Joan Thompson,  
15 who is or was the executive -- is the executive director of the  
16 CCRB and if I can explain what I handed to the Court this is  
17 Plaintiffs' Exhibit 5. The defendants have objected to this on  
18 hearsay and relevancy and prejudice grounds, the entire  
19 document. As the Court will see the first page is a letter  
20 from the Police Department and Deputy Commissioner Julie  
21 Schwartz regarding the outcome CCRB complaint and then the next  
22 three pages are the CCRB findings letter.

23                  THE COURT: So this cover letter tells the citizen, I  
24 guess, Ms. Acevedo, this is how we disposed of the CCRB case  
25 number whatever. Well, actually it doesn't say that. It says

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1 that the CCRB has referred the case to the Police Department.  
2 An review of the CCRB file will be conducted and you will be  
3 advised of the final action taken.

4 Is it attached? Does the citizen get this?

5 MS. BORCHETTA: Yes, your Honor. This was sent to  
6 Ms. Acevedo.

7 THE COURT: Then Ms. Acevedo gets from the CCRB the  
8 findings?

9 MR. CHARNEY: Yes.

10 THE COURT: The board reviewed the evidence and I am  
11 now writing to you to inform you of the board's findings. It  
12 summarizes the allegation and it gives the board's findings.  
13 There is also attached an explanation report defining the words  
14 "substantiated," "unsubstantiated," "exonerated," "unfounded,"  
15 "officers unidentified" and "miscellaneous."

16 MS. BORCHETTA: Your Honor, so if a few preliminary  
17 points. These largely I believe come from Ms. Thompson who is  
18 a witness on our list.

19 THE COURT: Who is Ms. Thompson?

20 MS. BORCHETTA: She is the executive director of the  
21 CCRB.

22 THE COURT: Right.

23 MS. BORCHETTA: We would like to admit these records  
24 in order to establish that the NYPD was informed of the CCRB  
25 finding's because then that prompts or doesn't prompt certain

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1 actions by the NYPD that we then will have witnesses to  
2 testify.

3 THE COURT: Let me understand this. It is twofold  
4 purpose I guess. Ms. Thompson is actually going to testify?

5 MS. BORCHETTA: Yes, your Honor. We would like to  
6 avoid her having to look at every one of these.

7 THE COURT: She will testify to the procedure and she  
8 will say it is the practice that when a citizen makes a  
9 complaint to send the citizen the letter with the findings.

10 MS. BORCHETTA: Correct, your Honor.

11 THE COURT: She will also say I gather that she sends  
12 it to the Police Department?

13 MS. BORCHETTA: Yes, your Honor.

14 THE COURT: That is what the cover letter says.  
15 Please be advised that the CCRB has referred the case to the  
16 Police Department. She will say it is the practice to send a  
17 copy to the Police Department.

18 MS. BORCHETTA: Yes, your Honor.

19 THE COURT: I think I understand. Who wants to be  
20 heard from the City of why shouldn't I accept these? I think  
21 by the way 803(6) also works, business records. I think they  
22 are business records and public records.

23 Go ahead.

24 MS. GROSSMAN: I think the first question is is the  
25 purpose in terms of the plaintiffs' claim that this is being

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1 offered for --

2 THE COURT: Relevance.

3 MS. GROSSMAN: -- the relevance.

4 THE COURT: I think we should hear from Ms. Borchetta.

5 I can guess, but it is not my place to make the argument.

6 MS. BORCHETTA: Your Honor, as I was saying we believe  
7 that once the CCRB informs the NYPD that, for example, an abuse  
8 of authority for a stop has been substantiated that that is a  
9 relevant fact that is putting the NYPD on notice. These are  
10 all letters relating to class member stops. These are class  
11 member witnesses who were stopped and its finding letters about  
12 their stop.

13 THE COURT: So, Ms. Grossman, that certainly sounds  
14 relevant that the CCRB found and substantiated the charge of  
15 abuse of authority with respect to Detective Hawkins having  
16 stopped Christina Acevedo or Detective DeMarco having stopped  
17 Christina Acevedo or Detective Esperanza having stopped  
18 Christina Acevedo. All of those are substantiated as abuse of  
19 authority. The point the Police Department is made aware of  
20 the CCRB findings. Again, it doesn't make the finding  
21 necessarily "truthful," but it means the Police Department knew  
22 that the CCRB knew that it was substantiated.

23 MS. GROSSMAN: Well, your Honor, that is one concern I  
24 had had is that it should be offered for the truth because you  
25 are the fact finder about whether or not the stop was based on

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1 reasonable suspicion.

2 THE COURT: You are right. All it shows is that the  
3 City is on notice of the CCRB's findings. There is no question  
4 that they received the CCRB's finding.

5 MS. GROSSMAN: Well, I guess the point is that the  
6 City does not dispute that it has received --

7 THE COURT: Good.

8 MS. GROSSMAN: -- this letter so there is no need to  
9 offer it into evidence.

10 THE COURT: Well, there is a need. If the City  
11 doesn't dispute that it receives all of the CCRB reports,  
12 right, so it would say as a blanket matter we have received all  
13 these point. That isn't the point. What they have to show is  
14 that they received notice that the CCRB concluded that certain  
15 activity was an abuse of authority. It doesn't make it abuse  
16 of authority. It just means again that the City is on notice  
17 that the CCRB reached that conclusion. So I have to see the  
18 conclusion.

19 Do you understand that it doesn't mean it is true, but  
20 the City knew that the CCRB was told that there was an abuse of  
21 authority by three police officers by stopping this person  
22 named Acevedo. That is all

23 MS. GROSSMAN: May we have a moment to confer, your  
24 Honor?

25 THE COURT: Sure.

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1 ( Pause )

2 MS. GROSSMAN: Your Honor, subject to the limitations  
3 that you've just expressed, we have no objection on Exhibit 5,  
4 but not all the CCRB related documents that the City has  
5 objected to are of the same quality. It is not the exact same  
6 document. So we have other objections regarding other CCRB  
7 related documents.

8                   THE COURT: How can we do them as a bucket? How can I  
9 say that X number of these are in? So all of those that look  
10 like this --

11 MS. GROSSMAN: I would say all letters that were sent  
12 to the civilian complainant by Julie Schwartz which attaches  
13 the findings from the letter that was sent by CCRB to the  
14 civilian complainant, we have no objection to.

15 THE COURT: They are all in.

16 MS. GROSSMAN: We can allow that to come in. That's  
17 one bucket.

18 MS. BORCHETTA: Your Honor, I have a point on that  
19 which is that I don't know that every single one of the  
20 findings letters that we have contains the cover letter like  
21 this one does.

22 THE COURT: I guess that is what we're going to turn  
23 to. All of those in this format are in.

24                   What is the next objection? In other words, is there  
25 a different format that you are concerned about?

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1 MS. BORCHETTA: Your Honor, if I may.  
2 THE COURT: I am trying to talk to Ms. Grossman.  
3 Now that all the ones look like this is are in, what  
4 does the next one look like?

5 MS. GROSSMAN: If I may have a moment, please?  
6 (Pause)

7 MR. KUNZ: Your Honor, with your permission we could  
8 show you the exhibit on the screen.

9 THE COURT: That would be great.

10 MS. GROSSMAN: I think we're talking about Plaintiffs'  
11 Exhibit 8, 11 and 14. I think generally the issue with these  
12 exhibits is that these are letters that were sent by the  
13 Civilian Complaint Review Board to the officer who was subject  
14 of the investigation and at deposition some of the officers did  
15 not believe that they received the actual letter. However,  
16 they don't dispute that they were aware that the charges were  
17 substantiated or what the outcome of the charges were. So to  
18 offer these exhibits when the witness said that he or she did  
19 not receive it --

20 THE COURT: They didn't exactly say that. They said  
21 they didn't remember receiving it. That is what you first  
22 said.

23 MS. GROSSMAN: I don't know the exact details. One of  
24 the members of the team has further details.

25 THE COURT: Right.

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1                   MR. KUNZ: Your Honor, on this issue with respect to a  
2 officer who received it, all the officers with respect to  
3 Exhibits 8, 11 and 14, Esperanza, Hawkins and DeMarco, each of  
4 them indicated they were aware of these charges that were  
5 substantiated against them and a supervisor spoke to them.  
6 They were not 100 percent sure if they received the document in  
7 this form.

8                   THE COURT: The purpose of offering this is to show  
9 that the Police Department was aware of the CCRB finding.  
10 You said they knew it was substantiated and that their  
11 supervisor spoke to them. So clearly the Police Department as  
12 a corporate entity was aware of the CCRB finding.

13                   MS. GROSSMAN: No. I think it is the police officer.

14                   THE COURT: No. No. No. He said and their  
15 supervisor spoke to them about it. That is what Mr. Marutollo  
16 just said.

17                   MS. GROSSMAN: Right. But the letter that is --

18                   THE COURT: I am not worried about the letter. I am  
19 still saying since the sole purpose of the letter is to show  
20 notice to the Police Department of the CCRB finding and the  
21 finding doesn't bind me at all but just notice and Mr.  
22 Marutollo said the supervisor spoke to the officer about it, of  
23 course the Police Department, the entity, knew about the CCRB  
24 findings.

25                   MS. GROSSMAN: I knew they knew. You are right they  
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1 did know. It is about misuse of a particular letter that is  
2 limited because it was directed to a particular officer and to  
3 impute that the supervisor received that particular letter --

4 THE COURT: No. The supervisor received notice that  
5 the CCRB found the charges substantiated. It is not really  
6 contested because the supervisor spoke to the officer about it.  
7 So I will take the letter for that limited purpose.

8 Remember, I am not taking it to say, Gee, the CCRB  
9 found it; I have to find it. I am not doing that. You point  
10 out that is for this Court to decide whether the stop was a  
11 good stop or bad stop. I am only saying that the Police  
12 Department had notice of the CCRB finding.

13 MS. GROSSMAN: But this particular piece of evidence  
14 doesn't establish that.

15 THE COURT: No. I know, but it is the quickest way to  
16 get there because Mr. Marutollo conceded that the supervisor  
17 spoke to the officer about the findings so of course the Police  
18 Department knew.

19 MS. GROSSMAN: I am saying the officers' testimony is  
20 going to establish that.

21 THE COURT: Overruled. I am taking the letter.

22 What is the third bucket, if any?

23 MR. MARUTOLLO: Your Honor, there is a third bucket  
24 list area. Specifically one as example, Exhibit 7, which is  
25 Officer DeMarco's CCRB interview on plaintiffs' exhibit list.

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1 I can explain basically what it is. It is the interview notes  
2 made by a CCRB investigator related to this investigation.  
3 However, the defendants submit that this is completely hearsay  
4 because it is all the CCRB's investigator's notes. In this  
5 particular example, the exact language is very significant  
6 because the CCRB investigator writes that Ms. Acevedo informed  
7 Officer DeMarco that he was a cop, when in fact the issue is,  
8 and according to Officer DeMarco, she said he was not a cop.  
9 There are important discrepancies between CCRB investigator's  
10 recap of the notes and as a result it seems it would not only  
11 be hearsay but confusing to witnesses and to the Court.

12 MS. BORCHETTA: Your Honor, as a category of documents  
13 there were some officers who accepted the accuracy and  
14 truthfulness of the statements. To the extent that they accept  
15 the --

16 THE COURT: Then it is their own statement once they  
17 adopt the statement. That is easy enough.

18 MR. MARUTOLLO: Your Honor, respectfully at these  
19 depositions, the officers have never said unequivocally the  
20 entire document.

21 THE COURT: She said some.

22 MR. MARUTOLLO: Parts.

23 THE COURT: Fine. That is very limited.

24 MR. KUNZ: I understand that, your Honor, but the  
25 overlay here is that actual audio recordings of these

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1 interviews are in plaintiffs' position so there is no reason to  
2 rely on a summary of a third person when they have the actual  
3 audio.

4 THE COURT: It is good they have it. I would need it  
5 transcribed if it is offered in evidence. I am not going to  
6 listen to it.

7 MR. KUNZ: It would only be impeachment, your Honor.

8 THE COURT: I understand. No. No. If it is a  
9 statement of the officer and if the officer finds the Police  
10 Department or if the officer is a defendant, then it is a prior  
11 statement and I would take it. It doesn't have to be  
12 impeachment. It is a prior statement of a party.

13 MR. KUNZ: Right. In most cases the officers are  
14 going to make the exact same statement on the stand.

15 THE COURT: That's fine.

16 MR. KUNZ: So why go and show a document that  
17 summarizes the exact same document.

18 THE COURT: Only if it contradicts it.

19 MR. KUNZ: They have the audiotapes.

20 THE COURT: I understand. That's fine. It is just  
21 that is probably technically hard to do. I don't know how to  
22 impeach with audiotape.

23 MR. KUNZ: If they want to transcribe the tapes, they  
24 can. We arranged to have a speaker here. They'll be using  
25 audio.

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1                   THE COURT: The bottom line is I cannot take these  
2 investigator's notes for the reason that Mr. Marutollo said,  
3 they are hearsay. But if the person adopts the statements or  
4 that portion of the statement they adopt, then I take that  
5 statement or portion of the statement. Otherwise they can be  
6 used to impeach if it contradicts what the witness says from  
7 the stand. If the person says something like, I never said  
8 that, that officer's summary is erroneous, that is the end of  
9 it unless it can be proved with extrinsic evidence, which will  
10 be the tape. I think we're on the same page.

11                   MR. KUNZ: Yes. So then these documents are not  
12 needed for any reason.

13                   THE COURT: Why do I have to do this twice? It  
14 depends. If the person adopted the statement, in haec verba,  
15 that paragraph two, I agree I said that. They can offer  
16 paragraph two if they wish. It can also be used for  
17 impeachment. If the person on the stand says, I never said  
18 that, that is the end of the matter unless it can be proved by  
19 extrinsic evidence, which would be the audiotape.

20                   MR. KUNZ: I think that works.

21                   THE COURT: So they are not coming in wholesale  
22 because they are hearsay.

23                   MR. MARUTOLLO: Your Honor, on the same CCRB area  
24 there is one other bucket and one particular issue that I  
25 wanted to bring to the Court's attention.

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1                   THE COURT: Okay.

2                   MR. MARUTOLLO: It is an objection that defendants  
3 made to Exhibit 101 which is a CCRB complaint report written by  
4 Ms. Kendra Edwards.

5                   THE COURT: Sorry.

6                   MR. MARUTOLLO: Ms. Kendra Edwards, who was the former  
7 girlfriend of one of the plaintiffs Deon Dennis in this case.  
8 Our objection to this particular exhibit is that again this  
9 exhibit is hearsay. Ms. Edwards is not testifying at trial.  
10 She is actually the person who made this complaint and frankly  
11 it is not clear that this complaint narrative was written by  
12 her or more likely by the CCRB investigator. On top of all  
13 that it is not really related to the stop at issue. It is  
14 related to more what took place afterwards.

15                  THE COURT: The best argument is it is hearsay. Why  
16 should I take this?

17                  MS. VARMER: Your Honor, this document was a CCRB  
18 complaint that was referred to Officer Fabio Rodriguez, who is  
19 from the office of the chief of the department within the  
20 precinct and who investigated the complaint. In his  
21 investigation, he reviewed this exact complaint. His  
22 deposition makes clear that he knew from this complaint that  
23 Mr. Dennis was stopped by Officer Salmeron and Pichardo. We  
24 intend to introduce this not for the truth of the matter but to  
25 show that Officer Rodriguez began his investigation of this

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1       incident with this complaint.

2       THE COURT: So now as I understand it, the plaintiffs  
3       are not offering it for the truth of it but solely to show  
4       Sergeant Rodriguez received this and so it was on notice of its  
5       contents and being on notice of its contents conducted an  
6       investigation. That is the limited purpose.

7       MR. MARUTOLLO: Your Honor, this goes to a separate  
8       but related point related to Sergeant Rodriguez's testimony  
9       because we have objected to Sergeant Rodriguez being a witness  
10       at all in this trial because as your Honor clearly stated at  
11       the January 4th conference, the stop of Deon Dennis related  
12       just to the stop and not to anything that happened after the  
13       stop, the precinct and all that.

14       THE COURT: That's true.

15       MR. MARUTOLLO: This investigation and the allegations  
16       made by Ms. Edwards relate to what happened after the stop. In  
17       fact, Mr. Dennis conceded at his deposition that Ms. Edwards  
18       was not present for the initial stop. So really any of her  
19       allegations are moot. As a result of Sergeant Rodriguez's  
20       investigation here --

21       THE COURT: Was it the same officer who stopped who is  
22       being complained about?

23       MR. MARUTOLLO: No. That is the thing. The target of  
24       this investigation is Officer Hayes who was not present for the  
25       stop, he was nearly the arresting officer.

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1           THE COURT: If this officer is being investigated by  
2 the CCRB and therefore by Sergeant Rodriguez was it part of the  
3 stop why it is relevant?

4           MS. VARMER: May I be heard?

5           THE COURT: Well, of course.

6           MS. VARMER: Part of our point is that based on the  
7 complaint it is clear that Ms. Edwards was complaining both  
8 about the stop and about the arrest and about the disrespectful  
9 behavior.

10          THE COURT: I am not interested right now about  
11 anything but the stop. Was she a present or not?

12          MS. VARMER: She was present. She was not present at  
13 the time that Mr. Dennis was stopped, but she came on to the  
14 scene when the officers were standing there and had detained  
15 Mr. Dennis.

16          MR. MARUTOLLO: She was present at time he was  
17 arrested.

18          THE COURT: I cannot tell that. I cannot tell whether  
19 she came on the scene when he was detained but not yet  
20 arrested.

21          MR. MARUTOLLO: Well, Mr. Dennis concedes that point.  
22 The plaintiff admits she was not present for the initial stop.

23          THE COURT: I got that. There is a continuum. You  
24 are stopped, you are sort of detained and then you are  
25 arrested. That could take a minute and a half or 10 minutes.

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1 I don't know. From the moment of stop until the moment of  
2 arrest, there is an interim where you are detained sometimes  
3 for questions, sometimes to show me your ID, sometimes don't  
4 move, sometimes people reach into the pocket, all kinds of  
5 things happen but you are not yet arrested. I don't know when  
6 she came on the scene. Whether it was post-stop or pre-arrest  
7 and that is the point that during this detention period he is  
8 free to leave or to go. It is a standard the United States  
9 Supreme Court writes about so therefore I did, too. In any  
10 event, it depends when she came across the scene.

11 This is an out-of-court statement. I cannot take it  
12 for its truth anyway. I am trying hard not to read it. I  
13 really don't want to read it until I decide it is or is not  
14 admissible. It would not be for its truth unless she wants to  
15 come forward and testify. All it can be used for is to show  
16 that Sergeant Rodriguez received it and based on whatever  
17 complained of he conducted an investigation or didn't  
18 investigated. It is like the CCRB complaints, I cannot take it  
19 for its truth if she is not showing up and being subjected to  
20 cross-examination. Unless Deon concedes exactly when she came,  
21 and he says he was already stopped. He don't know whether he  
22 was already arrested

23 MR. MARUTOLLO: Mr. Dennis indicates that she only  
24 came when the officers were checking for the warrant and as a  
25 result it seems as if the plaintiffs are using this warrant

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1 issue as both a sword and a shield because we're not allowed to  
2 talk about the warrant and the reason--

3 THE COURT: The point I gather from your statement he  
4 wasn't yet under arrest so it was the detention, that interim  
5 period where you are stopped.

6 MR. MARUTOLLO: I believe he was in handcuffs. So I  
7 believe he was under arrest.

8 THE COURT: I don't know. They are saying, No, he  
9 wasn't in handcuffs. You are saying, Yes. I don't really need  
10 to get into this level of detail. The sole purpose of this  
11 document is to say that Sergeant Rodriguez received and  
12 conducted an investigation. Not the contents, not the truth of  
13 it. If she is not here whatever she has to say about someone  
14 being rude is irrelevant to me. I don't want to know. I am  
15 talking about the notice issue.

16 MS. VARMER: Your Honor, we just reserve the right to  
17 review it and make appropriate redactions so it is not going  
18 to --

19 THE COURT: Right. Prejudice you. I am trying not to  
20 read it, but just understand the time line. The real purpose  
21 is not what she has to say because she is not coming in here  
22 and subjecting herself to cross-examination but that Sergeant  
23 Rodriguez was given notice of something and then acted or  
24 didn't act or what he did or didn't do.

25 MS. GROSSMAN: May I have a moment to confer, your  
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1 Honor?

2 THE COURT: Sure.

3 (Pause)

4 MR. CHARNEY: Your Honor, may I make a suggestion with  
5 respect to kind of how we deal with all this stuff?

6 THE COURT: Yes.

7 MR. CHARNEY: This is taking a long time and I know  
8 you are a busy person as are we, so we were wondering if we can  
9 just do the first week's worth of plaintiffs' exhibits.

10 THE COURT: Sure. We'll use all the time we have.

11 MR. CHARNEY: Okay. The first week and then the only  
12 other issue will be reports related to experts.

13 THE COURT: I forgot how we planned today. Are we  
14 coming back after the luncheon recess, or did I say the  
15 morning?

16 MS. GROSSMAN: Morning.

17 MR. CHARNEY: We have a lot to do as you do.

18 THE COURT: Well, I don't. I can continue this from  
19 2:00 to 4:00. You don't all have to stay. You can point to  
20 members of the team and we can keep going from 2:00 to 4:00. I  
21 do have the time. I have many other things to do, but I don't  
22 have court.

23 MS. GROSSMAN: Your Honor, the defense would propose  
24 we finish with the Deon Dennis so we don't have to revisit that  
25 and if we can prioritize with the first week's worth of

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1       witnesses and exhibits.

2           THE COURT: Fine.

3           MR. MARUTOLLO: A few other points related to the  
4       witnesses first and then discussing the remainder of the Deon  
5       Dennis exhibits. First, I guess a clarification with respect  
6       to Sergeant Fabio Rodriguez, again we still assert our  
7       objection based on the fact his investigation was related more  
8       to alleged behavior at the precinct.

9           THE COURT: They are not going to talk about what  
10      happened at the precinct. If they are talking about what he  
11      investigated in terms of the street conduct, even if it  
12      post-stop, pre-arrest, interim detention, that is the only part  
13      of the case that is mine. In other words, up until the arrest.  
14      After the arrest, we've talked about that. That is not a case  
15      where we're going into damages for what happened at the  
16      precinct. That was waived when the jury was waived.

17           MR. MARUTOLLO: Just a point of clarity. If the  
18      investigation related to only allegations at the precinct and  
19      the arrest, what is the purpose --

20           THE COURT: I already answered that.

21           MS. VARMER: Your Honor, the point of introducing the  
22      testimony about the investigation is that despite being on  
23      notice that the stop was an issue, Sergeant Rodriguez never  
24      spoke to the stopping officers. He spoke to Mr. Dennis for I  
25      think less than two minutes.

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1                   THE COURT: I got it.

2                   MS. VARMER: It was a deficient investigation.

3                   THE COURT: That is going on the point they didn't  
4 look into the stop.

5                   MR. MARUTOLLO: Your Honor, Sergeant Agron is listed  
6 as one of the witnesses for I believe next week. He was  
7 related to the Deon Dennis incident. Sergeant Agron was not  
8 physically present for the stop. He did not investigate  
9 anything related to the stop. There is no indication he was  
10 the supervisor of the officers, the two officers who stopped  
11 Mr. Dennis. And even if the plaintiffs contend that there is a  
12 roll call, which there is that indicates that he may have been  
13 working that night, it was an impact overtime session that he  
14 was working.

15                  THE COURT: Why don't we get an offer of proof? Why  
16 is this person here?

17                  MS. VARMER: Your Honor, Sergeant Agron was a  
18 supervisor in the same precinct as Officer Pichardo and  
19 Salmeron. He was the one who organized the roll call that  
20 night. He was also the sergeant who signed off on the arrest  
21 of Mr. Dennis, which is the only paperwork we have because the  
22 officers did not complete UF-250s. He also provides valuable  
23 Monell testimony about the chain of command and failures in  
24 supervision and training in his precinct. His testimony for  
25 example --

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1                   THE COURT: It doesn't relate to this stop at all.  
2 You want to talk to him about precinct training.  
3                   MR. CHARNEY: Your Honor, it is our belief, and we  
4 think the documents show this, that he was the assigned  
5 supervisor of the unit that the two stopping officers were  
6 working in on the night of the stop. It was a special overtime  
7 tour that they both worked. The sergeant overseeing that tour,  
8 it is our belief based on our exhibits and we plan to put in a  
9 document that he was the sergeant overseeing that tour. We  
10 believe he has relevant testimony. Has Ms. Hoff Varmer  
11 mentioned, he signed off on the arrest report.

12                   THE COURT: That doesn't interest me.

13                   MR. CHARNEY: I understand, but we believe the impact  
14 overtime documents do establish that he was the sergeant  
15 overseeing those officers on that tour that night.

16                   THE COURT: If it was, then what?

17                   MR. CHARNEY: Well, if he is the supervisor then he is  
18 responsible for their actions and how they behave on the  
19 street.

20                   THE COURT: He may be technically responsible. What  
21 is he going to say in his testimony? That is of interest to  
22 me.

23                   MS. VARMER: One of the things he will say is that he  
24 has never had a meaningful conversation with one of his  
25 subordinates about whether there was reasonable suspicion to

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1 make a stop.

2 THE COURT: Any stop?

3 MS. VARMER: Any stop.

4 THE COURT: Now I understand that is he being called  
5 as a general witness on precinct training and supervision  
6 practices.

7 MS. VARMER: And also to show that Officer Pichardo  
8 and Salmeron who stopped Mr. Dennis that night never had  
9 adequate supervision of that stop.

10 THE COURT: What do you mean never had adequate  
11 supervision of that stop, he never talked to them about the  
12 facts after the stop?

13 MS. VARMER: Yes.

14 THE COURT: Right. He is going to say that about any  
15 stop.

16 MR. MARUTOLLO: I agree, your Honor. Considering the  
17 plaintiffs have 102 witnesses, including many sergeants, it  
18 seems most effective to not have this person --

19 THE COURT: I don't think he can add much, but maybe  
20 they don't have anybody else in that precinct to talk about  
21 training or supervision and reporting and all that.

22 MR. MOORE: Your Honor, the issue of supervision is  
23 obviously the critical --

24 THE COURT: Yes, it is. Is there anything anybody  
25 else --

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1 MR. MOORE: To the extent the City is not complaining  
2 about more supervisors are necessary --

3 THE COURT: Right. Cumulative.

4 MR. MOORE: -- we'll hear at the end there were not  
5 enough supervisors.

6 THE COURT: I am asking you whether you have another  
7 supervisor talking about practices in that particular precinct?

8 MR. CHARNEY: Not at the sergeant level.

9 THE COURT: Fine. You can have one sergeant. What  
10 can I do? He was the supervisor in that precinct. He has no  
11 knowledge of this stop. I am not going to let him wonder off  
12 into something that happened afterwards in the precinct. It is  
13 not going to happen. I don't have the time to waste. If they  
14 want to ask him about practices as a supervisor in that  
15 precinct, Mr. Marutollo, the question is going to be something  
16 like that, Was it your practice after stops were made when you  
17 were the supervisor of the tour was it your practice to debrief  
18 the officers and find out their basis of the stop. And he will  
19 say, No, I never did that. Done. Thanks for coming in.  
20 Good-bye. If that is the testimony, that is the testimony.

21 MS. GROSSMAN: May I have a moment, your Honor?

22 THE COURT: Yes.

23 (Pause)

24 MS. GROSSMAN: Your Honor, I think what we need to do  
25 is confer amongst ourselves and not delay on the other items

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1 because one of the concerns I have about the adequacy of the  
2 investigation argument in terms of these documents having to do  
3 with the investigation is that if the investigation includes an  
4 aspect of the warrant issue or the --

5 THE COURT: You can parse it. I am not going to  
6 listen to that.

7 MS. GROSSMAN: Right. What I am saying is if the  
8 plaintiffs are going to claim that our investigation was  
9 inadequate, then it becomes important for the Court to know  
10 what was the part and the focus of the investigation and why it  
11 is that the investigation ran a certain course as opposed to  
12 the course that plaintiffs believe it should have taken. So we  
13 need to just caucus on our end and let the Court know whether  
14 we do have objections or we don't. And then my apologies I  
15 thought if this wasn't coming in, if no part of the post-arrest  
16 information was coming into evidence, then it was not an issue.  
17 Now that some of it may be coming in, I am concerned.

18 THE COURT: I don't think it is. I think it is one  
19 question and one answer. Agron guy is not going be on the  
20 stand long. He is going to asked as a sergeant in the what  
21 precinct?

22 MS. VARMER: 28th.

23 THE COURT: Was it your practice when stops were made  
24 while you were the subject in charge of that tour, did you  
25 debrief the officers when they made a stop? Did you go over

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1 it? Did they complete a 250? Did you look at the arrest  
2 report? After a series of no answers, he will leave the  
3 courtroom.

4 MS. GROSSMAN: With Agron I was actually, because this  
5 is all related to the same plaintiff, Deon Dennis, going back  
6 to the Rodriguez issue.

7 THE COURT: Oh.

8 MS. GROSSMAN: My apologies. I am just concerned if  
9 the plaintiffs are allowed to offer in some of this information  
10 and to go to their claim that our investigations were  
11 inadequate --

12 THE COURT: Investigations of the stop. You have to  
13 have some faith. The Court does not want to sit here for four  
14 months. I want to City here for the two months and not a day  
15 more. I am going to limit it. I am only interested in an  
16 investigation, if any, about the circumstances of the stop. I  
17 don't want to know if they looked to whether people were rude  
18 at the precinct.

19 MS. GROSSMAN: I understand that. Whatever the  
20 investigation into the stop was --

21 THE COURT: Or wasn't.

22 MS. GROSSMAN: -- or wasn't you will hear. But to  
23 that end we would like the opportunity to at least explain that  
24 the reason why the Police Department did not look into the  
25 circumstances of the details of the stop is that from their

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1 perspective the focus of the complaint was really the warrant.

2 THE COURT: That doesn't take very long.

3 MS. GROSSMAN: That's fine, your Honor. As long as  
4 we're free to develop that.

5 THE COURT: Briefly.

6 MS. VARMER: Your Honor, one point on that. There are  
7 a host of documents on defendants' exhibit lists and actually I  
8 handful of documents on plaintiffs' exhibit list that I think  
9 are only on the list to the extent that the warrant and the  
10 adequacy of the arrest is at issue. To the extent that --

11 THE COURT: I don't think it is. This is about a  
12 stop, when the stop was made. Was the officer trying to  
13 enforce a warrant?

14 MR. CHARNEY: No.

15 MS. VARMER: No.

16 THE COURT: Then it is of no interest.

17 MR. MARUTOLLO: That is not accurate, your Honor.

18 Sorry to interrupt. During the course of the stop that is when  
19 the warrant was learned of.

20 THE COURT: I understand that. The basis for stopping  
21 someone -- it was not like they were sending the squad out  
22 looking for people who run on warrants. We have that. The  
23 marshals here have a warrant squad and they go out and look for  
24 John Doe on an outstanding warrant. They are looking.

25 MS. VARMER: Your Honor --

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1 MR. MARUTOLLO: Just two points. On plaintiffs'  
2 exhibit list, they still include a decline to prosecute form, a  
3 prisoner roster form. These are clearly irrelevant.

4 THE COURT: They are clearly relevant?

5 MR. MARUTOLLO: Irrelevant.

6 MS. VARMER: They are relevant to the extent the  
7 defendants are allowed to introduce evidence of the warrant.

8 THE COURT: Please, I am trying to make this simpler.  
9 The warrant is of no interest to me. It is not the basis for  
10 the stop, period. As I said we have a warrant squad here, the  
11 marshals, if somebody has an open warrant, they send out a  
12 squad looking for him or her -- well, never her -- looking for  
13 him to close the open warrant. That wasn't the case here.  
14 They made a street stop. The only issue is the basis for the  
15 stop. I understand that once he was stopped, the warrant  
16 information is developed. Maybe that goes to the free-to-leave  
17 issue when in that stop did they realize there was an  
18 outstanding warrant up until that time there was a basis for  
19 the stop, was he free to leave. Once they figured out the  
20 warrant, he was not free to leave but for a different reason.  
21 Now they have an open warrant.

22 MS. GROSSMAN: Our officers stopped him because they  
23 had probable cause to issue a summons for open container. It  
24 wasn't even a reasonable suspicion stop.

25 THE COURT: Good.

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1 MS. GROSSMAN: From our standpoint when we then check  
2 for a warrant and then we arrest him, we bring him into the  
3 precinct. So the investigation is focused on the warrant.

4 THE COURT: I got it.

5 MS. GROSSMAN: It is hard to know how this is going to  
6 play out next week. So we just want to reserve the right to  
7 address any claim that the investigation was inadequate if that  
8 is where this is going.

9 THE COURT: Obviously the plaintiffs disagree with the  
10 reason for the stop is the open container.

11 MS. VARMER: Your Honor, to the extent that they are  
12 reserving the right to introduce documents about the warrant,  
13 then I would also reserve the right to introduce documents  
14 about the invalidity of the warrant.

15 THE COURT: Look, I don't want to go into this  
16 warrant. I don't think I am.

17 MS. VARMER: Neither do we. We would prefer to strike  
18 the whole lot of these documents, but to the extent they are  
19 allowed to talk about why he was arrested, we should be able to  
20 talk about why it was completely pointless.

21 THE COURT: I don't think they are allowed to talk  
22 about why he was arrested. The only reason that comes up  
23 Ms. Grossman argues is that your complaint that the  
24 investigation is inadequate. They need to defend the  
25 investigation by saying he was arrested on a warrant,

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1       rightfully arrested or rightfully held and rightfully brought  
2       to the precinct all based on the warrant. I don't want to go  
3       there. It depends on how much you focus on the adequacy of the  
4       investigation. If you never say that, they will never say the  
5       word "warrant." We'll just look at the stop circumstances,  
6       period. If you want to go into the adequacy of the  
7       investigation, they have to point out eventually he is arrested  
8       on a warrant.

9            MS. VARMER: Your Honor, two points.

10           THE COURT: We're not moving very quickly if this is  
11       going to take us a half hour per exhibit. We'll be here for  
12       months pretrial.

13           MS. VARMER: Your Honor, the first is that the  
14       investigation is easily decided between the warrant and the  
15       stop.

16           THE COURT: That's what I am hoping.

17           MS. VARMER: We'll be happy to redact --

18           THE COURT: Good. Do it. Limit your exhibits and  
19       documents and let's see what you offer.

20           Now what are we doing?

21           MR. CHARNEY: Can we address the expert exhibits, and  
22       Mr. Hellerman is going to do that. Hopefully it will be quick.

23           MR. HELLERMAN: Thank you, your Honor. We're on  
24       plaintiffs' exhibits so I will address Officer Fagan's reports  
25       and declarations. Admitting them we believe with appropriate

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1 redactions, because there are parts of his proposed opinions  
2 that your Honor has ruled cannot give, we think will streamline  
3 the trial.

4 THE COURT: Admitting what?

5 MR. HELLERMAN: Admitting Professor Fagan's reports  
6 and declarations that he has put in that express his various  
7 opinions.

8 THE COURT: You oppose all reports and declarations,  
9 even portions of them?

10 MS. COOKE: No, your Honor. We were the first party  
11 to put in expert reports on our exhibit list. That was based  
12 on my involvement in the Ligon and you said, Of course the  
13 expert reports are coming in. The expert reports were  
14 indicated as exhibits. The objections were made to improper  
15 designation of the expert report and all reference materials  
16 cited therein as the exhibit. So we think the report, the  
17 analysis of the report, the opinions in the report and  
18 certainly appendixes to the report, but not for the truth of  
19 the matter or into the evidence, every article cited and  
20 footnote and reference source. That seems overly broad and  
21 inappropriately designated.

22 MR. HELLERMAN: Your Honor, I think perhaps our  
23 exhibit description could have been written better. We're not  
24 asking the Court to admit every reference that Professor Fagan  
25 cited.

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1                   THE COURT: Good.

2                   MR. HELLERMAN: We're asking for the admission of the  
3 reports and everything in the reports, other than that that  
4 should be redacted.

5                   THE COURT: And not by incorporation of references?

6                   MR. HELLERMAN: No.

7                   THE COURT: If he cites an artical, the article is not  
8 in evidence.

9                   MR. HELLERMAN: That's right. If it is in the report  
10 or appended to the report --

11                  THE COURT: Yes. It seemed you are in agreement.

12                  MS. COOKE: If I may further add. One additional  
13 thing the defendants in preparing for this conference I noticed  
14 that we had inadvertently deleted the second supplemental  
15 report of Smith and Patel in response to Professor Fagan's last  
16 report. So I will add that to the end of our exhibit list.

17                  THE COURT: You should follow that up with a letter.

18                  MS. COOKE: We will.

19                  THE COURT: Saying what you just said.

20                  MS. COOKE: Yes, your Honor.

21                  With respect to several of the plaintiffs' objection  
22 to defendants' exhibits report with reference to declarations  
23 filed by Professor Smith and/or Professor Patel, those  
24 declarations contain substantive analysis. They were in  
25 response to the Daulbert motions. Those are regression in

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1       opinions and analysis and we believe those are just as  
2       appropriate as exhibits as the reports.

3            MR. HELLERMAN: I think that the Smith materials are a  
4       little bit different from the Fagan materials. So much of what  
5       professor Dr. Smith put in his expert report had been ruled out  
6       that --

7            MR. CHARNEY: By you.

8            MR. HELLERMAN: -- by you, your Honor, that what is  
9       left is mostly hearsay statements about police practices, which  
10       he cannot testify is the truth.

11           THE COURT: Well, no, but experts often rely on  
12       statements of others to form their experts opinions. That  
13       happens in every case. I am sure you worked with many experts  
14       in many other kinds of cases. So experts rely on other  
15       people's statements. When you take that for what they  
16       considered, they say I considered this and this in reaching my  
17       opinion. Everyone understands those are out-of-court  
18       statements, but the expert is saying this is the basis of my  
19       opinion. I will take that.

20           Your first point is a better point, which is saying if  
21       I ruled out, for example, Smith's testimony about how effective  
22       this program is for lowering crime, that is not an issue in  
23       this trial. I explained why. You can do a lot of bad things  
24       to stop crime and they wouldn't be constitutional but they  
25       would work but we don't do that. That is not something I am

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1 going to allow. If some of this Smith declaration material  
2 goes to how wonderful the program is -- I am not supposed to  
3 say "program" -- practice, how wonderful it is in reducing  
4 crime, that part is out. So you need to redact these  
5 declarations so that the portions I have said are not coming in  
6 are not coming in.

7 MS. COOKE: Right. With respect to Professor Smith's  
8 ability to be testify with respect to his expertise and  
9 experience in police practice that was not the subject of your  
10 Daulbert ruling.

11 MR. HELLERMAN: I am not addressing the efficacy  
12 issue. I am addressing Professor Smith's statements about what  
13 the police do. He may have expertise in this, but the  
14 statements in his report are without attribution.

15 THE COURT: They come from him. That's his expertise.

16 MR. CHARNEY: He doesn't work for the NYPD.

17 THE COURT: He doesn't need to. He is an expert in  
18 police practices.

19 MR. CHARNEY: He is, but he is not saying generally  
20 this is what the police do. He says the NYPD does this  
21 specific thing.

22 THE COURT: He is a professor.

23 MS. COOKE: He studied, your Honor, operations impact  
24 extensively.

25 THE COURT: I am allowing it. I am allowing it.

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1                   MR. HELLERMAN: We will work with the defendants on  
2 redactions.

3                   THE COURT: Okay.

4                   MR. HELLERMAN: Just to clarify, your Honor, once the  
5 expert report comes in, you don't need a separate exhibit, for  
6 example, the Professor's CV and data and sources. It is all in  
7 the report.

8                   THE COURT: If it is in the report, that's fine.

9                   MS. COOKE: I would propose that Mr. Hellerman and I  
10 will work it out and exchange proposed redactions. They are  
11 not on for many, many weeks. Fagan will be much earlier. So  
12 we'll work on Fagan first.

13                  The other point I would note, and I don't know how  
14 this will be dealt with in redactions, but as your Honor may  
15 recall in the course of the Daulbert that the defendants made  
16 with Professor Fagan to his report, there were corrections and  
17 errors of significant quantities -- hundreds of thousands of  
18 stops -- so his report is inaccurate in those representations  
19 and we've had a series of subsequent reports from Professor  
20 Fagan but the original report with the errors your Honor ruled  
21 in the Daulbert motion with respect to those, but I don't know  
22 if we can redact that. I don't know how your Honor will prefer  
23 to do that.

24                  THE COURT: Maybe you can mark it with a red marker,  
25 circle that paragraph and say "conceded that it needed

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1 corrections," or "conceded to be erroneous, corrected later,"  
2 or something in the margin so that when I review it, it helps  
3 me to recall that he conceded he had to redo that portion based  
4 on my ruling.

5 MS. COOKE: Yes.

6 MR. HELLERMAN: Your Honor, with respect to the extent  
7 that that an error that he omitted pertained to an opinion that  
8 you later ruled that he cannot give, we would propose to redact  
9 that.

10 THE COURT: That's better. That's fine, too. If he  
11 didn't correct it but withdrew it, that's fine.

12 MS. COOKE: Well, I think the mistakes I am referring  
13 to by Professor Fagan was with respect to classification for  
14 reasonable suspicion analysis and then the numbers and the  
15 quality of certain few hundred thousand stops were erroneously  
16 included.

17 THE COURT: But you redid the figures at a later  
18 version?

19 MR. HELLERMAN: Which he did, your Honor.

20 THE COURT: Yes. As I said mark it off.

21 MS. COOKE: Identified in the original.

22 THE COURT: Yes. Refer me to the revised.

23 MS. COOKE: Mr. Hellerman will do that for Fagan and  
24 then we'll exchange.

25 THE COURT: Good.

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1                   Now what?  
2                   MR. CHARNEY: So I think maybe the most efficient is  
3 to do -- if there are any other objections that the defendants  
4 have to the first week's worth of exhibits.

5                   THE COURT: Let's do it.

6                   MS. COOKE: I have an objection, your Honor.

7                   THE COURT: Okay.

8                   MS. COOKE: To a Exhibit 332.

9                   THE COURT: One second. 332, audio recording by  
10 Officer Serrano.

11                   MS. COOKE: Your Honor, let me explain this exhibit.  
12 We were in court on May 5th for a conference and on the  
13 evening --

14                   THE COURT: May 5th?

15                   MS. COOKE: March 5th. On the evening of March 7th  
16 the plaintiffs notified us by e-mail that they were producing  
17 what is now Exhibit 332. So for the first time on March 7th we  
18 became aware of this recording.

19                   THE COURT: What is this recording?

20                   MS. COOKE: It is a recording of Officer Serrano, who  
21 is an officer at the 40th precinct made of a conversation that  
22 he had at the 40th precinct that occurred on February 14th,  
23 2013. The date is important. So we were informed our  
24 March 7th that we were getting this recording. On March 12th  
25 per your Honor's direction Officer Serrano provided the

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1 defendants with an affidavit with respect to recordings. In  
2 the affidavit Officer Serrano states that he provided that  
3 recording to plaintiffs' counsel on March 1st. Plaintiffs'  
4 counsel didn't identify the March 5th conference when we talked  
5 about an affidavit on the other two audio recordings that they  
6 were in possession of a third they intended to use.

7 THE COURT: Third what?

8 MS. COOKE: Third audio recording that they intended  
9 to use. We provided notice on March 7th. I received the  
10 affidavit on the 12th, which indicated when they provided it,  
11 March 1st and on I believe also on March 12th the plaintiffs  
12 identified by the affidavit that actually a second version of  
13 that audio recording was going to be provided or replacement  
14 copy. The replacement copy is substantively different than the  
15 original copy I received on March 7th. That is because the  
16 original copy as I understand from Officer Serrano's affidavit  
17 he played the audio from a device and recorded it that way.  
18 Then the second time he actually downloaded the audio from his  
19 device. There are substantive differences in the recordings.

20 THE COURT: When you say "substantive," you mean the  
21 quality?

22 MS. COOKE: Content. There is content. There is dead  
23 air and some content at the beginning of the original recording  
24 I received plus about six minutes of what sounds like traffic  
25 noise and a baby crying and some other things at the end. The

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1 second recording I received is a downloaded version. So it  
2 doesn't include the noise.

3 THE COURT: So that is good. We're all saved from  
4 listening to the noise.

5 MS. COOKE: My point is, your Honor, I was not able  
6 until yesterday when I received the recording to start matching  
7 up the plaintiffs' intended use and designation portions of  
8 this exhibit. I believe it was untimely produced by the  
9 affidavit the plaintiffs had it on March 1st. We were in court  
10 on March 5th. It was produced late on March 7th. It is not  
11 even one they intended to use.

12 THE COURT: Does he say when he gave them the other  
13 versions?

14 MS. COOKE: On march 11th.

15 MS. BORCHETTA: May I?

16 THE COURT: You got it on March 12th.

17 MS. BORCHETTA: Your Honor, there were technical  
18 difficulties here. He provided us something on March 1st I  
19 believe but we couldn't -- there were technical problems in our  
20 receipt of it. We provided it to the defendants.

21 THE COURT: You received it six days later.

22 MS. BORCHETTA: Sorry. As soon as we were able to get  
23 the recording, we provided it.

24 THE COURT: As soon as you were able to make it work  
25 so to speak, listen to it?

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1 MS. BORCHETTA: Right. Thereafter, as your Honor  
2 directed us to do preparing his affidavit, which included  
3 authenticating these recordings, we learned that he had played  
4 his cell phone recording, which is how he recorded this  
5 conversation, and then with another hand recorded it with  
6 another device. We anticipated that the defendants might  
7 object on authenticity grounds so we brought him in on Monday,  
8 got the technology person to figure out how to get it off the  
9 phone and put it onto a disk and we immediately hand-delivered  
10 it to the defendants.

11 We also provided when the defendants yesterday  
12 indicated there were some delivery issues on their end with  
13 their mailroom, we went through the designated portions on that  
14 recording and gave them descriptions so they could find them on  
15 the recording they already have. We were addressing an  
16 authenticity issue. We resolved it. It is not that much time  
17 in total.

18 THE COURT: The one you received on the 11th, how long  
19 is that whole recording?

20 MS. BORCHETTA: The whole recording, your Honor, is  
21 about 30 minutes. It is about 15 minutes of dead air or people  
22 talking in the hallway. It is about 15 minutes of substance.

23 MS. COOKE: Your Honor, further to my objection to the  
24 late production of this exhibit, the recording is of a meeting  
25 that occurred on February 14th. This witness is listed as, I

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1 believe, their seventh or eighth witness testifying at trial.  
2 This witness was, as you recall, a witness that was not  
3 identified until the very last day of 2012 per your Honor's  
4 direction. So this entire issue with respect to this witness  
5 and the number of witnesses I have had to identify to defend  
6 against, we're prejudiced by the untimely production of an  
7 audible that was in the plaintiffs' possession for at least six  
8 days provided.

9 THE COURT: I can't really find that the plaintiffs  
10 did anything wrong. When they got it, it wasn't apparently in  
11 usable workable condition due to technical problems. By the  
12 time they got it to work so to speak, they turned it over  
13 immediately. Then when authentication was raised, they figured  
14 they better try to get the closest to the original. They  
15 talked to the fellow and he said, Well, this is how I did it, a  
16 cell phone here, other device here, so I am giving you  
17 everything, the originals, the best, you figure out that what  
18 to do with it. It sounds like they gave it to you the next  
19 day. They got it the 11th and gave it to you the 12th. It is  
20 not like it has been in existence three years. It only  
21 occurred a month ago today. It is 15 minutes of substance.  
22 Get your technical people, get a transcript and that's it.

23 MS. COOKE: Your Honor, to that the witness is being  
24 called in the first week of trial, I would raise that again.  
25 To the extent that there are people identified, there are

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1 others speakers, I dispute the characterization that most of  
2 the tape or half of the tape is not of substance. There is  
3 content and speaking the entirety of the tape. It is a long  
4 meetings with respect to Professor Serrano's --

5 MR. MOORE: Officer.

6 MS. COOKE: Sorry. Officer Serrano's performance  
7 evaluation. There are several speakers on the tape, some of  
8 which the plaintiffs have identified, some of which they have  
9 not. I reserve the right, your Honor, to call additional  
10 witnesses.

11 THE COURT: If you have to call additional witnesses,  
12 that's fine.

13 MS. COOKE: I note for the record, your Honor, the  
14 defendants object to the inclusion of this as evidence.

15 THE COURT: It was late-breaking evidence that is for  
16 sure.

17 MS. GROSSMAN: Your Honor, for next week Plaintiffs'  
18 Exhibit 25.

19 THE COURT: Wait. I have a lot of pages to go through  
20 to get back to 25.

21 MS. GROSSMAN: I am sorry, your Honor. Just to stay  
22 focused on Serrano-related issues, Ms. Cooke is going to  
23 address another thing.

24 MS. COOKE: One more, your Honor. I am trying to find  
25 the number. It is 294.

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1                   THE COURT: 294?

2                   MS. COOKE: Yes.

3                   THE COURT: Arbitration order?

4                   MS. COOKE: The plaintiffs have indicated they intend

5                   to use this exhibit of Officer Pedro Serrano from the 40th

6                   precinct. This is an arbitration decision and order with

7                   respect to Deputy Inspector McCormick from when he was the 20th

8                   precinct in Manhattan with respect to a grievance made by an

9                   Officer Rajinder Singh. Officer Singh filed a grievance

10                  against the Police Department with respect to his captain at

11                  the time, Deputy Inspector McCormick at the 20th precinct.

12                  Inspector McCormick is now the commanding officer at the 40th

13                  precinct. This arbitration decision and order with respect to

14                  Rajinder Singh's grievance is not a substantive decision on the

15                  merits. It is a decision on the issue of the arbitrability of

16                  Rajinder Singh's claim under the collective bargaining

17                  agreement. It is not dispositive.

18                  THE COURT: Why is this here? I don't want this.

19                  MS. BORCHETTA: Your Honor, in abundance of caution

20                  put this on our exhibits for the first week.

21                  THE COURT: In abundance of kindness will you withdraw

22                  it?

23                  MS. BORCHETTA: No, no. With respect to Officer

24                  Serrano, but we believe we should be able to use it with

25                  Captain McCormick, who is a later witness.

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1 MS. COOKE: Inspector.  
2 THE COURT: Why?  
3 MR. CHARNEY: A grievance about quotas was filed  
4 against him.  
5 THE COURT: It is a grievance.  
6 MR. CHARNEY: It goes to notice, your Honor. If the  
7 same precinct commander who --  
8 THE COURT: This decision is a decision about  
9 arbitrability by some arbitrator. I am not interested in  
10 reading it. It shouldn't be included in the record. Is there  
11 not another way that you can produce evidence that somebody  
12 filed a grievance?  
13 MS. COOKE: Your Honor, we produced a grievance file  
14 of Rajinder Singh, which includes endorsements from the Police  
15 Department.  
16 THE COURT: If you want to prove notice that the  
17 Police Department had notice that somebody was complaining  
18 about Inspector McCormick, you have done it. She said you gave  
19 the evidence to do it. This arbitration decision should not be  
20 cluttering my record.  
21 MR. CHARNEY: Well, if they are going to object to  
22 that--  
23 THE COURT: Just for the purpose of notice that the  
24 Police Department knew that somebody complained about this  
25 inspector.

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1 MR. CHARNEY: For this exact same thing that Officer  
2 Serrano is complaining about just to make it clear.

3 THE COURT: It is okay to show the notice of what the  
4 complaint was. It doesn't have any validity or truth with me,  
5 but the notice issue I have ruled three different times today  
6 and three different contexts that, yes, you can show that the  
7 City knew that a complaint saying X, Y, Z was made. It doesn't  
8 make it true but they knew. Whatever the complaint says, it  
9 says in terms of the notice issue. Let's get rid of the  
10 arbitration.

11 MR. CHARNEY: We have the right to supplement our  
12 exhibit lists with some of these notices.

13 THE COURT: If you didn't put them in, yes. They are  
14 allowed to show that somebody made a complaint.

15 MS. COOKE: I agree with your Honor's characterization  
16 by Mr. Charney that they were the same claims not to be  
17 determined. We're not conceding that.

18 THE COURT: Of course not.

19 And now Exhibit 25?

20 MS. GROSSMAN: Yes. That a May 4th --

21 THE COURT: One second. NYPD tapes?

22 MS. GROSSMAN: No.

23 THE COURT: Yes.

24 MS. GROSSMAN: May 4th, 2010 article.

25 THE COURT: Yes, village Voice article. It says

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1 May 3rd, 2010 here. It is a newspaper article.

2 MS. GROSSMAN: Yes, your Honor. The newspaper article  
3 concerns quotes from audio tapes that are on the plaintiffs'  
4 exhibit list and will be played the first week of trial.

5 THE COURT: What do I need the newspaper article for?

6 MR. CHARNEY: The article does more than quote the  
7 recordings. It talks about the different players involved in  
8 those recordings.

9 THE COURT: The article itself is hearsay.

10 MR. CHARNEY: Exactly. Your Honor ruled in January  
11 and we made it clear at that point that we're not offering it  
12 for the truth.

13 THE COURT: What are you offering it for?

14 MR. CHARNEY: For notice?

15 THE COURT: Notice to whom about what?

16 MR. CHARNEY: To certain witnesses who will testify  
17 about what happened in the 81st precinct, their knowledge of  
18 it, what their response to it was.

19 THE COURT: To the article?

20 MR. CHARNEY: Well, because, yes. The article came  
21 out and it caused a great sensation in the media circles in the  
22 City. The Police Department was asked about these allegations.  
23 We're not offering it for the truth. We have always said we're  
24 not offering any newspaper articles for truth of the matter  
25 asserted in there. We'll use it solely for notice.

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1 THE COURT: Notice -- finish the sentence.  
2 MR. CHARNEY: Notice to high-ranking New York Police  
3 Department officials including commanders.

4 THE COURT: How do we know the commanders saw this  
5 article because they responded?

6 MR. CHARNEY: Well, the matter asserted therein, we  
7 can ask them if they have knowledge of it, does this refresh  
8 your recollection of what happened back in May.

14 MR. CHARNEY: To the extent certain officials are  
15 quoted in those articles, we think we should be allowed to ask  
16 them about it generally.

19 MR. CHARNEY: On the issue of notice to the extent  
20 that certain statements are attributed -- not the statements on  
21 the recordings, statements about the NYPD learning of this  
22 situation in the 81st precinct, what their response to it was.

25 MS. GROSSMAN: Your Honor, I think the reason why this  
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1 is coming to my attention now is this is one of the exhibits  
2 where Inspector Mauriello, who will be testifying next week --  
3 so Inspector Mauriello was deposed. There are audio tapes that  
4 are going be played so to the extent that this article is  
5 giving Inspector Mauriello notice about what he said on the  
6 audio tapes, that purpose doesn't make sense.

7 MR. CHARNEY: That's not why we are offering it.

8 MS. GROSSMAN: If the plaintiffs are saying they want  
9 to use it for another witness to show notice, that may be. But  
10 for this witness coming up next week, which is what I am  
11 focusing on, this article should not be used for that purpose  
12 because we have the tapes. The plaintiff has been deposed.

13 THE COURT: I think it would be cumulative to use it  
14 for the point of saying he had notice.

15 MS. GROSSMAN: Right.

16 MR. CHARNEY: We will not use it to try to show he had  
17 notice of what was said on the tapes. We would use it to show  
18 whether or not he had notice that there was outcry about what  
19 had happened.

20 THE COURT: Why don't you just ask him.

21 MR. CHARNEY: We will. We are trying to protect  
22 ourselves in a situation where he denies it. At his  
23 deposition -- his notice of these things was a lot -- seemed to  
24 us seemed be to be a lot smaller than we would have expected  
25 given what we heard on the recording.

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1                   THE COURT: Basically he is saying he is holding it in  
2 reserve for impeachment if the person denies knowing.

3                   MR. CHARNEY: Yes, your Honor.

4                   THE COURT: I think we should stop now. Now the  
5 question is should we reconvene?

6                   MR. CHARNEY: One last issue about first week  
7 witnesses?

8                   MS. PATEL: I think this will take one minute.

9                   THE COURT: I hope so.

10                  MS. PATEL: It is really to clarify an evidentiary  
11 issue that came up on January 4th in the motion in limine  
12 conference. The defendants raised the issue that they wanted  
13 to exclude the testimony of plaintiffs where officers were  
14 unidentified and what they wrote in their letter was how they  
15 were told about the basis of their stops. There was an  
16 argument around that issue. I want to clarify that the  
17 plaintiffs are not intending to offer those statements by and  
18 large for the truth of the matter asserted. We don't actually  
19 think that there is a hearsay issue here. For example, when  
20 the officer says, Put your hands against the wall, it is to  
21 give context and explain the action of the plaintiff. I wanted  
22 to clarify that we don't actually think -- there may not be  
23 disagreement and I wanted to make sure the defendants --

24                  THE COURT: It may depend on what the alleged  
25 statement is. If the alleged statement was, Put your hands

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1 against the wall, there is no truth in that anyway. It is an  
2 assertion or command. If the statement is a racial epithet or  
3 something like that or bad words, I don't know what that is,  
4 but we don't know the speaker and the attribution made. It is  
5 hard to contest that. I don't know what you are asking me  
6 honestly.

7 MS. PATEL: Well, at the conference your Honor  
8 suggested that we raise with you any statements that we believe  
9 would fit within this motion in limine so that you could have  
10 time in advance to rule or research.

11 THE COURT: Why give me any specific other than put  
12 your hands against the wall?

13 MS. PATEL: In general none of them are being asserted  
14 for the truth of the matter. So put your hands against the  
15 wall, they asked me for ID, they asked me where I was going,  
16 they asked me if I had drugs or weapons in my pocket -- none of  
17 these are for the truth of the matter asserted.

18 THE COURT: For the fact that the statement was made.

19 MS. GROSSMAN: Your Honor, it is very hard to respond  
20 without knowing. I need something in writing so I can figure  
21 out -- if this is the representation, these three statements,  
22 we need time to caucus. If there are any other statements, I  
23 want to know that immediately because I want to be able to  
24 address it and to the delay the trial.

25 THE COURT: Right now the statements that she gave,  
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1 and she gave it was more than three, four or five questions,  
2 those are for the fact that the statement was made or assertion  
3 was made, not for the truth of it.

4 MS. GROSSMAN: I don't know the difference between  
5 that.

6 THE COURT: It is a verbal act. It is an act. That  
7 is all it is. In other words, do you have any guns or drugs.

8 MS. GROSSMAN: The witness can say, I had to put my  
9 hands against the wall instead of saying an officer told me to  
10 put my hands against the was.

11 THE COURT: No. I will allow it, The officer told me  
12 to put my hand against the wall.

13 Do you want to came back at 2:00 or not?

14 MR. CHARNEY: No.

15 THE COURT: I didn't mean it was enjoyable. Are we  
16 doing something effective or should we stop for today and I  
17 will see you Monday morning?

18 MS. GROSSMAN: We have other issues that are going to  
19 be --

20 THE COURT: See you at 2:00.

21 MS. PATEL: Would it be possible to clarify that?

22 THE COURT: No. I can't right now. I am now late to  
23 meet someone.

24 (Luncheon recess)

25

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1 AFTERNOON SESSION

2 2:10 p.m.

3 THE COURT: Where should we pick up?

4 MS. BORCHETTA: Actually, we have been able to work  
5 out the remaining objections for the next week's exhibits. We  
6 just didn't want to leave, since you had said you were coming  
7 back to speak with us, in case there was anything additional  
8 you wanted to address.

9 THE COURT: No. Do you want to put any agreements on  
10 the record or somebody was seeking some clarification when I  
11 had to leave. If you don't need me, I am ready to leave the  
12 bench.

13 MS. BORCHETTA: We're fine.

14 MS. GROSSMAN: The city is fine.

15 THE COURT: OK. Thank you.

16 See you Monday.

17 Who is doing the openings?

18 MS. BORCHETTA: Darius Charney is doing it for  
19 plaintiffs.

20 MS. GROSSMAN: Myself.

21 THE COURT: OK. Thanks.

22 (Adjourned)

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